

OFFICIAL CODE OF GEORGIA ANNOTATED

2012 Supplement

Including Acts of the 2012 Regular Session of the General Assembly

Prepared by

The Code Revision Commission

The Office of Legislative Counsel

and

The Editorial Staff of LexisNexis®



Published Under Authority of the State of Georgia

Volume 7 2006 Edition

Title 9. Civil Practice (Chapters 11-15)

Including Annotations to the Georgia Reports
and the Georgia Appeals Reports

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Charlottesville, Virginia**

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ISBN 978-0-327-11074-3 (set)
ISBN 978-0-8205-7181-2

5012729

THIS SUPPLEMENT CONTAINS

Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2012 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through March 30, 2012. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through March 30, 2012.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2012 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2012 supplement pamphlets and in the bound volumes of the Code.

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TITLE 9

CIVIL PRACTICE

VOLUME 6

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O.C.G.A. § 9-11-15(c) has not been incorporated into the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *McLendon v. Advertising That Works*, 292 Ga. App. 677, 665 S.E.2d 370 (2008).

Habeas corpus proceeding. — Habeas court's order denying an inmate's verified petition, which asserted that trial counsel rendered ineffective assistance, was reversed, as the allegations contained in said petition served as sufficient evidence to support the inmate's claim that counsel failed to file a notice of appeal after being instructed by the inmate to do so. *Rolland v. Martin*, 281 Ga. 190, 637 S.E.2d 23 (2006).

In rem quiet title actions. — Default judgment against owners in a quiet title action based on their failure to answer was improper because, once the in rem proceeding was instituted, the trial court was required, pursuant to O.C.G.A. § 23-3-63, to submit the matter to a special master, and a special master was never appointed such that service could have properly been completed pursuant to the Quiet Title Act, O.C.G.A. § 23-3-60 et seq.; since the Quiet Title Act provided specific rules of practice and procedure

with respect to an in rem quiet title action against all the world, the Civil Practice Act, O.C.G.A. § 9-11-1 et. seq., was inapplicable. *Woodruff v. Morgan County*, 284 Ga. 651, 670 S.E.2d 415 (2008).

Civil procedure rules not adequate substitute for substantive constitutional rights of in personam forfeiture proceedings. — In an in personam forfeiture proceeding, pursuant to the Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-7(m), a trial court erred by finding that the civil procedural rules set forth in the Georgia Civil Practice Act, O.C.G.A. § 9-11-1 et seq., were an adequate substitute for the substantive constitutional rights to which the property owners were entitled. As a result, the Supreme Court of Georgia held that § 16-14-7(m) was unconstitutional because it deprived in personam forfeiture defendants of the safeguards of criminal procedure guaranteed by the United States and Georgia Constitutions. *Cisco v. State*, 285 Ga. 656, 680 S.E.2d 831 (2009).

Construction with other law. — Upon reading the rules within the Civil Practice Act in para materia with Ga. Unif. Super. Ct. R. 24.6(B), the trial court was authorized to grant a divorce well after 30 days from the time an answer

would have been due; hence, the trial court did not err in denying a wife's motion to set said judgment aside. *Hammack v. Hammack*, 281 Ga. 202, 635 S.E.2d 752 (2006).

Cited in *Ga. Pines Cmty. Serv. Bd. v. Summerlin*, 282 Ga. 339, 647 S.E.2d 566 (2007).

Courts to Which Chapter Applicable

Special master's award in condemnation proceeding. — Trial court properly refused to dismiss a landowner's appeal on grounds that it failed to express

dissatisfaction with the compensation awarded by the special master, as it provided the utility with sufficient notice under the Civil Practice Act, O.C.G.A. § 9-11-1 et seq., that the landowner was objecting to the valuation given on the property; moreover, in light of the interest that the utility acquired in the property, and the purposes for which it intended to use that property, consequential damages potentially represented a significant portion of the compensation the landowner could recover. *Ga. Power Co. v. Stowers*, 282 Ga. App. 695, 639 S.E.2d 605 (2006).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 1 Am. Jur. Pleading and Practice Forms, Accord and Satisfaction, § 33.

ARTICLE 2

COMMENCEMENT OF ACTION AND SERVICE

Law reviews. — For annual survey on trial practice and procedure, see 61 *Mercer L. Rev.* 363 (2009).

9-11-3. Commencement of action; filing of civil case filing form.

Law reviews. — For annual survey of trial practice and procedure, see 58 *Mercer L. Rev.* 405 (2006).

JUDICIAL DECISIONS

Filing must be followed by service.

Despite the fact that the Court of Appeals of Georgia could not discern whether a personal injury action filed by a husband and wife against a driver was dismissed because the statute of limitation had expired or because the husband and wife were not diligent in attempting service, the trial court did not abuse its discretion in dismissing the action because the driver had never been personally served with the complaint prior to the expiration of the statute of limitation. *Nyass v. Tilahun*, 281 Ga. App. 542, 636 S.E.2d 714 (2006).

Timeliness of service. — Trial court properly dismissed a plaintiff's personal

injury action filed against defendant on insufficient service of process grounds, as: (1) plaintiff did little to pursue service; (2) plaintiff inappropriately shifted the burden of said search on the court; and (3) the fact that defendant served interrogatories and a request for production did not amount to a waiver of an insufficient service of process defense. *Kelley v. Lymon*, 279 Ga. App. 849, 632 S.E.2d 734 (2006).

Bankruptcy trustee's late service on a driver did not relate back to the filing of the personal injury complaint where the trustee failed to show that the trustee reasonably and diligently insured that service was made as quickly as possible after the driver made the trustee aware of

the driver's true residence. *Webster v. Western Express, Inc.*, No. 5:05-CV-350 (WDO), 2007 U.S. Dist. LEXIS 70011 (M.D. Ga. Sept. 21, 2007).

Because a plaintiff did not satisfy the plaintiff's burden of showing that the plaintiff exercised due diligence in perfecting service of process on the defendant, the trial court abused the court's discretion in denying the defendant's motion to dismiss. *Jones v. Brown*, 299 Ga. App. 418, 683 S.E.2d 76 (2009).

Action commenced as of filing date.

Trial court did not err in dismissing an officer's claims against an entity on the ground that the claims were filed in violation of an automatic bankruptcy stay provided by 11 U.S.C. § 362 because, when the original complaint was filed, that entity was a debtor in bankruptcy; the automatic stay was in effect at the time the action was commenced, rendering the claims against the entity void ab initio. *Odion v. Varon*, 312 Ga. App. 242, 718 S.E.2d 23 (2011).

Laches finding against plaintiff. —

In a personal injury suit, although plaintiff passenger attempted to serve defendant driver only once prior to the expiration of the statute of limitation, upon encountering difficulty locating the driver, the passenger's response was delayed at best, notwithstanding the imminent running of the statute of limitation, and the passenger did not even try to serve the driver until after the statute had run; thus, under the circumstances, the trial court properly found the passenger guilty of laches. *Patterson v. Lopez*, 279 Ga. App. 840, 632 S.E.2d 736 (2006).

Cited in *Kirkland v. Tamplin*, 283 Ga. App. 596, 642 S.E.2d 125 (2007); *Fox v. City of Cumming*, 289 Ga. App. 803, 658 S.E.2d 408 (2008); *Rooks v. Tenet Health Sys. GB, Inc.*, 292 Ga. App. 477, 664 S.E.2d 861 (2008); *Batesville Casket Co. v. Watkins Mortuary, Inc.*, 293 Ga. App. 854, 668 S.E.2d 476 (2008).

9-11-4. Process.

(a) **Summons — Issuance.** Upon the filing of the complaint, the clerk shall forthwith issue a summons and deliver it for service. Upon request of the plaintiff, separate or additional summons shall issue against any defendants.

(b) **Summons — Form.** The summons shall be signed by the clerk; contain the name of the court and county and the names of the parties; be directed to the defendant; state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address; and state the time within which this chapter requires the defendant to appear and file appropriate defensive pleadings with the clerk of the court, and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against him or her for the relief demanded in the complaint.

(c) **Summons — By whom served.** Process shall be served by:

(1) The sheriff of the county where the action is brought or where the defendant is found or by such sheriff's deputy;

(2) The marshal or sheriff of the court or by such official's deputy;

(3) Any citizen of the United States specially appointed by the court for that purpose;

(4) A person who is not a party, not younger than 18 years of age, and has been appointed by the court to serve process or as a permanent process server; or

(5) A certified process server as provided in Code Section 9-11-4.1.

Where the service of process is made outside of the United States, after an order of publication, it may be served either by any citizen of the United States or by any resident of the country, territory, colony, or province who is specially appointed by the court for that purpose. When service is to be made within this state, the person making such service shall make the service within five days from the time of receiving the summons and complaint; but failure to make service within the five-day period will not invalidate a later service.

(d) Waiver of service.

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) Upon receipt of notice of an action in the manner provided in this subsection, the following defendants have a duty to avoid unnecessary costs of serving the summons:

(A) A corporation or association that:

(i) Is subject to service under paragraph (1) or (2) of subsection (e) of this Code section; and

(ii) Receives notice of such action by an agent other than the Secretary of State; and

(B) A natural person who:

(i) Is not a minor; and

(ii) Has not been judicially declared to be of unsound mind or incapable of conducting his or her own affairs.

(3) To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request shall:

(A) Be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent or other agent authorized by appointment to receive service of process for a defendant subject to service under paragraph (1) or (2) of subsection (e) of this Code section;

(B) Be dispatched through first-class mail or other reliable means;

(C) Be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) Make reference to this Code section and shall inform the defendant, by means of the text prescribed in subsection (1) of this Code section, of the consequences of compliance and of failure to comply with the request;

(E) Set forth the date on which the request is sent;

(F) Allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) Provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

(4) If a defendant located within the United States that is subject to service inside or outside the state under this Code section fails to comply with a request for a waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure is shown.

(5) A defendant that, before being served with process, returns a waiver so requested in a timely manner is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(6) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (5) of this subsection, as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(7) The costs to be imposed on a defendant under paragraph (4) of this subsection for failure to comply with a request to waive service of summons shall include the costs subsequently incurred in effecting service, together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(e) **Summons — Personal service.** Except for cases in which the defendant has waived service, the summons and complaint shall be served together. The plaintiff shall furnish the clerk of the court with such copies as are necessary. Service shall be made by delivering a copy of the summons attached to a copy of the complaint as follows:

(1) If the action is against a corporation incorporated or domesticated under the laws of this state or a foreign corporation authorized

to transact business in this state, to the president or other officer of the corporation, secretary, cashier, managing agent, or other agent thereof, provided that when for any reason service cannot be had in such manner, the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him or her or with any other person or persons designated by the Secretary of State to receive such service a copy of such process, notice, or demand, along with a copy of the affidavit to be submitted to the court pursuant to this Code section. The plaintiff or the plaintiff's attorney shall certify in writing to the Secretary of State that he or she has forwarded by registered mail or statutory overnight delivery such process, service, or demand to the last registered office or agent listed on the records of the Secretary of State, that service cannot be effected at such office, and that it therefore appears that the corporation has failed either to maintain a registered office or to appoint a registered agent in this state. Further, if it shall appear from such certification that there is a last known address of a known officer of the corporation outside the state, the plaintiff shall, in addition to and after such service upon the Secretary of State, mail or cause to be mailed to the known officer at the address by registered or certified mail or statutory overnight delivery a copy of the summons and a copy of the complaint. Any such service by certification to the Secretary of State shall be answerable not more than 30 days from the date the Secretary of State receives such certification;

(2) If the action is against a foreign corporation or a nonresident individual, partnership, joint-stock company, or association, doing business and having a managing or other agent, cashier, or secretary within this state, to such agent, cashier, or secretary or to an agent designated for service of process;

(3) If against a minor, to the minor, personally, and also to such minor's father, mother, guardian, or duly appointed guardian ad litem unless the minor is married, in which case service shall not be made on the minor's father, mother, or guardian;

(4) If against a person residing within this state who has been judicially declared to be of unsound mind or incapable of conducting his or her own affairs and for whom a guardian has been appointed, to the person and also to such person's guardian and, if there is no guardian appointed, then to his or her duly appointed guardian ad litem;

(5) If against a county, municipality, city, or town, to the chairman of the board of commissioners, president of the council of trustees, mayor or city manager of the city or to an agent authorized by

appointment to receive service of process. If against any other public body or organization subject to an action, to the chief executive officer or clerk thereof;

(6) If the principal sum involved is less than \$200.00 and if reasonable efforts have been made to obtain personal service by attempting to find some person residing at the most notorious place of abode of the defendant, then by securely attaching the service copy of the complaint in a conspicuously marked and waterproof packet to the upper part of the door of the abode and on the same day mailing by certified or registered mail or statutory overnight delivery an additional copy to the defendant at his or her last known address, if any, and making an entry of this action on the return of service; or

(7) In all other cases to the defendant personally, or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

(f) Summons — Other service.

(1) Service by publication.

(A) **General.** When the person on whom service is to be made resides outside the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself or herself to avoid the service of the summons, and the fact shall appear, by affidavit, to the satisfaction of the judge or clerk of the court, and it shall appear, either by affidavit or by a verified complaint on file, that a claim exists against the defendant in respect to whom the service is to be made, and that he or she is a necessary or proper party to the action, the judge or clerk may grant an order that the service be made by the publication of summons, provided that when the affidavit is based on the fact that the party on whom service is to be made resides outside the state, and the present address of the party is unknown, it shall be a sufficient showing of such fact if the affiant shall state generally in the affidavit that at a previous time such person resided outside this state in a certain place (naming the place and stating the latest date known to affiant when the party so resided there); that such place is the last place in which the party resided to the knowledge of affiant; that the party no longer resides at the place; that affiant does not know the present place of residence of the party or where the party can be found; and that affiant does not know and has never been informed and has no reason to believe that the party now resides in this state; and, in such case, it shall be presumed

that the party still resides and remains outside the state, and the affidavit shall be deemed to be a sufficient showing of due diligence to find the defendant. This Code section shall apply to all manner of civil actions, including those for divorce.

(B) **Property.** In any action which relates to, or the subject of which is, real or personal property in this state in which any defendant, corporate or otherwise, has or claims a lien or interest, actual or contingent, or in which the relief demanded consists wholly or in part of excluding such defendant from any interest therein, where the defendant resides outside the state or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself or herself to avoid the service of summons, the judge or clerk may make an order that the service be made by publication of summons. The service by publication shall be made in the same manner as provided in all cases of service by publication.

(C) **Publication.** When the court orders service by publication, the clerk shall cause the publication to be made in the paper in which sheriff's advertisements are printed, four times within the ensuing 60 days, publications to be at least seven days apart. The party obtaining the order shall, at the time of filing, deposit the cost of publication. The published notice shall contain the name of the parties plaintiff and defendant, with a caption setting forth the court, the character of the action, the date the action was filed, the date of the order for service by publication, and a notice directed and addressed to the party to be thus served, commanding him or her to file with the clerk and serve upon the plaintiff's attorney an answer within 60 days of the date of the order for service by publication and shall bear teste in the name of the judge and shall be signed by the clerk of the court. Where the residence or abiding place of the absent or nonresident party is known, the party obtaining the order shall advise the clerk thereof; and it shall be the duty of the clerk, within 15 days after filing of the order for service by publication, to enclose, direct, stamp, and mail a copy of the notice, together with a copy of the order for service by publication and complaint, if any, to the party named in the order at his or her last known address, if any, and make an entry of this action on the complaint or other pleadings filed in the case. The copy of the notice to be mailed to the nonresident shall be a duplicate of the one published in the newspaper but need not necessarily be a copy of the newspaper itself. When service by publication is ordered, personal service of a copy of the summons, complaint, and order of publication outside the state in lieu of publication shall be equivalent to serving notice by publication and to mailing when proved to the satisfaction of the judge or other-

wise. The defendant shall have 30 days from the date of such personal service outside the state in which to file defensive pleadings.

(2) **Personal service outside the state.** Personal service outside the state upon a natural person may be made: (A) in any action where the person served is a resident of this state, and (B) in any action affecting specific real property or status, or in any other proceeding in rem without regard to the residence of the person served. When such facts shall appear, by affidavit, to the satisfaction of the court and it shall appear, either by affidavit or by a verified complaint on file, that a claim is asserted against the person in respect to whom the service is to be made, and that he or she is a necessary or proper party to the action, the court may grant an order that the service be made by personal service outside the state. Such service shall be made by delivering a copy of the process together with a copy of the complaint in person to the persons served.

(3) **Service upon persons in a foreign country.** Unless otherwise provided by law, service upon a person from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within the United States:

(A) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(B) If there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(i) In the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(ii) As directed by the foreign authority in response to a letter rogatory or letter of request; or

(iii) Unless prohibited by the law of the foreign country, by:

(I) Delivery to the person of a copy of the summons and the complaint; or

(II) Any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(C) By other means not prohibited by international agreement as may be directed by the court.

(4) Service upon persons residing in gated and secured communities.

(A) As used in this paragraph, the term “gated and secured communities” means multiple residential or commercial properties, such as houses, condominiums, offices, or apartments, where access to the multiple residential or commercial properties is restricted by a gate, security device, or security attendant that restricts public entrance onto the property; provided, however, that a single residence, farm, or commercial property with its own fence or gate shall not be included in this definition.

(B) Any person authorized to serve process shall be granted access to gated and secured communities for a reasonable period of time during reasonable hours for the purpose of performing lawful service of process upon:

- (i) Identifying to the guard or managing agent the person, persons, entity, or entities to be served;
- (ii) Displaying a current driver’s license or other government issued identification which contains a photograph; and
- (iii) Displaying evidence of current appointment as a process server pursuant to this Code section.

(C) Any person authorized to serve process shall promptly leave gated and secured communities upon perfecting service of process or upon a determination that process cannot be effected at that time.

(g) **Territorial limits of effective service.** All process may be served anywhere within the territorial limits of the state and, when a statute so provides, beyond the territorial limits of the state.

(h) **Return.** The person serving the process shall make proof of such service with the court in the county in which the action is pending within five business days of the service date. If the proof of service is not filed within five business days, the time for the party served to answer the process shall not begin to run until such proof of service is filed. Proof of service shall be as follows:

- (1) If served by a sheriff or marshal, or such official’s deputy, the affidavit or certificate of the sheriff, marshal, or deputy;
- (2) If by any other proper person, such person’s affidavit;
- (3) In case of publication, the certificate of the clerk of court certifying to the publication and mailing; or
- (4) The written admission or acknowledgment of service by the defendant.

In the case of service otherwise than by publication, the certificate or affidavit shall state the date, place, and manner of service. Failure to make proof of service shall not affect the validity of the service.

(i) **Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(j) **Alternative service.** The methods of service provided in this Code section are cumulative and may be utilized with, after, or independently of other methods of service. Whenever a statute provides for another method of service, service may be made under the circumstances and in the manner prescribed by the statute or under any other methods prescribed in this Code section. The provisions for service by publication provided in this Code section shall apply in any action or proceeding in which service by publication may be authorized by law; and, where by law special provision is made for service by publication, the procedure for such service by publication provided in this Code section may be utilized in lieu thereof. In all cases or special proceedings where the requirements or procedure for service, or both, are not prescribed by law and in any situation where the provisions therefor are not clear or certain, the court may prescribe service according to the exigencies of each case, consistent with the Constitution.

(k) **Service in probate courts and special statutory proceedings.** The methods of service provided in this Code section may be used as alternative methods of service in proceedings in the probate courts and in any other special statutory proceedings and may be used with, after, or independently of the method of service specifically provided for in any such proceeding; and, in any such proceeding, service shall be sufficient when made in accordance with the statutes relating particularly to the proceeding or in accordance with this Code section.

(l) **Forms.**

NOTICE OF LAWSUIT AND REQUEST FOR
WAIVER OF SERVICE OF SUMMONS

TO: (Name of individual defendant or name of officer or agent of corporate defendant) as (title, or other relationship of individual to corporate defendant) of (name of corporate defendant to be served, if any)

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed). A copy of the complaint is attached to this notice. The complaint has been filed in the (court named on the complaint) for the State of Georgia in and for the County of (county) and has been assigned (case number of action).

This is not a formal summons or notification from the court, but rather my request pursuant to Code Section 9-11-4 of the Official Code of Georgia Annotated that you sign and return the enclosed Waiver of Service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within 30 days (or 60 days if located outside any judicial district of the United States) after the date designated below as the date on which this Notice of Lawsuit and Request for Waiver of Service of Summons is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the Waiver of Service is also attached for your records. **YOU ARE ENTITLED TO CONSULT WITH YOUR ATTORNEY REGARDING THIS MATTER.**

If you comply with this request and return the signed Waiver of Service, the waiver will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed except that you will not be obligated to answer or otherwise respond to the complaint within 60 days from the date designated below as the date on which this notice is sent (or within 90 days from that date if your address is not in any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Georgia Rules of Civil Procedure and then, to the extent authorized by those rules, I will ask the court to require you (or the party on whose behalf you are addressed) to pay the full cost of such service. In that connection, please read the statement concerning the duty of parties to avoid unnecessary costs of service of summons, which is set forth on the Notice of Duty to Avoid Unnecessary Costs of Service of Summons enclosed herein.

I affirm that this Notice of Lawsuit and Request for Waiver of Service of Summons is being sent to you on behalf of the Plaintiff on this _____ day of _____.

Signature of plaintiff's attorney
or
Unrepresented plaintiff

WAIVER OF SERVICE OF SUMMONS

To: (Name of plaintiff's attorney or unrepresented plaintiff)

I acknowledge receipt of your request that I waive service of a summons in the action of (caption of action), which is case number (docket number) in the (name of court) of the State of Georgia in and for the

County of (county). I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me. I understand that I am entitled to consult with my own attorney regarding the consequences of my signing this waiver.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by the Georgia Rules of Civil Procedure.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the entity on whose behalf I am acting) if an answer is not served upon you within 60 days after the date this waiver was sent, or within 90 days after that date if the request for the waiver was sent outside the United States.

This _____ day of _____, _____.

(Signed)

(Printed or typed name of defendant)
as (title) _____
of (name of corporate defendant, if any)

NOTICE OF DUTY TO AVOID UNNECESSARY
COSTS OF SERVICE OF SUMMONS

Subsection (d) of Code Section 9-11-4 of the Official Code of Georgia Annotated requires certain parties to cooperate in saving unnecessary costs of service of the summons and the pleading. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for such defendant's failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must, within the time specified on the waiver form, serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and also must file a signed copy of the response with the court. If the answer is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received. (Ga. L. 1966, p. 609, § 4; Ga. L. 1967, p. 226, §§ 1-3, 51; Ga. L. 1968, p. 1036, § 1; Ga. L. 1968, p. 1104, §§ 1, 2; Ga. L. 1969, p. 487, § 1; Ga. L. 1972, p. 689, §§ 1-3; Ga. L. 1980, p. 1124, § 1; Ga. L. 1982, p. 3, § 9; Ga. L. 1984, p. 22, § 9; Ga. L. 1989, p. 364, § 1; Ga. L. 1991, p. 626, § 1; Ga. L. 1993, p. 91, § 9; Ga. L. 2000, p. 1225, § 1; Ga. L. 2000, p. 1589, §§ 3, 4; Ga. L. 2002, p. 1244, § 1; Ga. L. 2010, p. 822, §§ 2, 3, 4/SB 491; Ga. L. 2012, p. 695, § 1/HB 1048.)

The 2010 amendment, effective July 1, 2010, in subsection (c), designated the existing provisions as paragraphs (c)(1) through (c)(4), substituted "by." for "by the" at the end of the introductory paragraph, added "The" at the beginning of paragraphs (c)(1) and (c)(2), in paragraph (c)(1), deleted a comma following "found" and substituted a semicolon for "; or by the", in paragraph (c)(2), deleted a comma following "court" and substituted a semicolon for "; or by any", substituted a semicolon for "; or by someone" at the end of paragraph (c)(3), in paragraph (c)(4), added "A person" at the beginning and substituted "; or" for a period at the end, and added paragraph (c)(5); added paragraph (f)(4); and, in the introductory paragraph of subsection (h), substituted "proof of such service with the court in the county in which the action is pending within five business days of the service date" for "proof of service thereof to the court promptly and, in any event, within the time during which the person served must respond to the process" and added the second sentence.

The 2012 amendment, effective July 1, 2012, substituted the present provisions of paragraph (c)(4) for the former

provisions, which read: "A person who is not a party and is not younger than 18 years of age and has been appointed as a permanent process server by the court in which the action is brought; or"; and substituted the present provisions of paragraph (c)(5) for the former provisions, which read: "A certified process server under Code Section 9-11-4.1, provided that the sheriff of the county for which process is to be served allows such servers to serve process in such county."

Law reviews. — For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For article, "What is Reasonable Service?," see 12 Ga. St. B.J. 22 (2007). For survey article on administrative law, see 60 Mercer L. Rev. 1 (2008). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008). For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

For note, "Extra! Read All About It: Why Notice by Newspaper Publication Fails to Meet Mullane's Desire to Inform Standard and How Modern Technology Provides a Viable Alternative," see 45 Ga. L. Rev. 1095 (2011).

JUDICIAL DECISIONS

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General Consideration

Georgia Tort Claims Act. — O.C.G.A. § 50-21-35 does not provide the exclusive method for service of process on a state entity under the Georgia Tort Claims Act; rather, O.C.G.A. § 9-11-4(e)(5), part of the Civil Practice Act, applies to claims brought under the Georgia Tort Claims Act, and accordingly service on a community board was not improper when the summons and complaint were not handed personally to the board's director. *Ga. Pines Cmty. Serv. Bd. v. Summerlin*, 282 Ga. 339, 647 S.E.2d 566 (2007).

Purpose of service.

Summons issued by a clerk of court under O.C.G.A. § 9-11-4 is not an order of court for the purpose of requiring an answer to an amended complaint and a defendant is not required to file an answer to an amended complaint unless the trial court itself has affirmatively ordered such answer. *Shields v. Gish*, 280 Ga. 556, 629 S.E.2d 244 (2006).

Motion to dismiss, etc.

Because a personal representative failed to effectuate proper service of a personal injury suit on a passenger of a vehicle involved in an accident in which the decedent was killed, especially after having been placed on notice that service had not been perfected, the passenger's motion to dismiss said suit was properly granted. *Ballenger v. Floyd*, 282 Ga. App. 574, 639 S.E.2d 554 (2006).

Because service of process of a consolidated declaratory judgment action was not sufficiently perfected on two defendant brothers, neither waived service, and despite the fact that one brother might have had notice of the earlier action,

the clear requirements of O.C.G.A. § 9-11-4(e)(7) were not dispensed with, and the trial court erred in denying the brothers' motion to dismiss the action. *Tavakolian v. Agio Corp.*, 283 Ga. App. 881, 642 S.E.2d 903 (2007).

Reasonable diligence established.

— Because the plaintiff presented sufficient evidence that, after filing its complaint, it provided the sheriff's office with the defendant's correct address, and a few weeks later, contacted the sheriff's office to inquire whether service had been completed upon the defendant and learned that repeated service attempts were unsuccessful, evidence of reasonable diligence supporting the denial of a motion to set aside a default judgment was found; moreover, unlike O.C.G.A. § 9-11-4(e)(1), service via overnight delivery was supported and did not violate the defendant's due process rights. *B&B Quick Lube, Inc. v. G&K Servs. Co.*, 283 Ga. App. 299, 641 S.E.2d 198 (2007).

Reasonable diligence not shown. —

Motorist sued a driver over injuries allegedly sustained in an auto accident. As the motorist took no steps whatsoever to perfect service for approximately four months after the limitations period of O.C.G.A. § 9-3-33 lapsed, the motorist did not act diligently; therefore, service of process did not relate back to the original filing date. *McCullers v. Harrell*, 298 Ga. App. 798, 681 S.E.2d 237 (2009), cert. denied, No. S09C1914, 2010 Ga. LEXIS 55 (Ga. 2010).

Failure to comply with statute. —

Trial court did not err in granting a creditor's motion for default judgment on the ground that a debtor failed to answer the complaint within thirty days pursuant to

O.C.G.A. § 9-11-12(a) because the trial court was authorized to conclude that the debtor's counsel executed an acknowledgment and waiver pursuant to O.C.G.A. § 9-10-73, that, therefore, the debtor's answer was due within thirty days after the acknowledgment and waiver, and that because it failed to serve an answer within that thirty-day period, its answer was untimely. O.C.G.A. § 9-11-4 did not apply because the acknowledgment of service the creditor drafted and submitted to the debtor did not make reference to § 9-11-4, and the creditor also did not inform the debtor by means of the text prescribed in § 9-11-4(1). *Satnam Waheguru Corp. v. Buckhead Cmty. Bank*, 304 Ga. App. 438, 696 S.E.2d 430 (2010).

No proof of issuance of summons in the record. — There was no proof in the record that a summons was issued identifying the law firm that foreclosed on a plaintiff's home as a defendant, although the law firm was mentioned in the complaint. Therefore, no jurisdiction was obtained over the law firm, and the law firm was not in default. *Fairfax v. Wells Fargo Bank, N. A.*, 312 Ga. App. 171, 718 S.E.2d 16 (2011).

Who May Serve Process

Appointment of permanent process servers.

Trial court did not err in finding that service upon the county school district employees was perfected pursuant to O.C.G.A. § 9-11-4(c) because a court order appointing the process server in question as a permanent process server for the Superior Courts of the Ocmulgee Judicial Circuit, which included Hancock County, authorized that process server to serve the complaint, and the employees did not dispute that the employees were actually served with the complaint; whether the permanent process server was authorized to file the sheriff's entries of service rather than the server's own affidavits as proof of service bore no weight in determining whether proper service was in fact made. *Cosby v. Lewis*, 308 Ga. App. 668, 708 S.E.2d 585 (2011).

Specially appointed person authorized to serve process.

Because a personal injury plaintiff

failed to file said action against an uninsured/underinsured motorist insurer within the applicable statutory period, and the action was not subject to renewal, as the magistrate court's determination that service was made by an unauthorized person, thus rendering the original action void, the insurer was entitled to dismissal. *Lewis v. Waller*, 282 Ga. App. 8, 637 S.E.2d 505 (2006).

Timeliness of Service

Five-day period not absolute.

Within the context of a parental rights termination proceeding, a juvenile court had the discretion to determine whether to grant an extension of time for a putative father to serve his legitimation petition on the mother, pursuant to O.C.G.A. §§ 15-11-96(i) and 19-7-22(b), and Georgia case law that allowed application of the procedural rules set out in the Civil Practice Act, including O.C.G.A. § 9-11-4(c) relating to service and extensions thereto; accordingly, the juvenile court's refusal to hear the legitimation petition was error, as was the decision to terminate the putative father's parental rights under O.C.G.A. § 15-11-94 without first determining that he had standing under the legitimation action. In the *Interest of A.H.*, 279 Ga. App. 77, 630 S.E.2d 587 (2006).

Effect of service of process on statute of limitations.

Based on sufficient evidence that a resident stood idle for six months after learning of the difficulties in serving a non-resident, the resident's personal injury complaint was properly dismissed on grounds that the resident failed to exercise due diligence in effectuating service of process; hence, the statute of limitations under O.C.G.A. § 9-3-33 was not tolled. *Livingston v. Taylor*, 284 Ga. App. 638, 644 S.E.2d 483 (2007).

Plaintiff had to act with greatest possible diligence. — Trial court properly dismissed a plaintiff's personal injury action filed against defendant on insufficient service of process grounds, as: (1) plaintiff did little to pursue service; (2) plaintiff inappropriately shifted the burden of said search on the court; and (3) the fact that defendant served interrogatories

and a request for production did not amount to a waiver of an insufficient service of process defense. *Kelley v. Lymon*, 279 Ga. App. 849, 632 S.E.2d 734 (2006).

In a personal injury suit, although plaintiff passenger attempted to serve defendant driver only once prior to the expiration of the statute of limitation, upon encountering difficulty locating the driver, the passenger's response was delayed at best, notwithstanding the imminent running of the statute of limitation, and the passenger did not even try to serve the driver until after the statute had run; thus, under the circumstances, the trial court properly found the passenger guilty of laches. *Patterson v. Lopez*, 279 Ga. App. 840, 632 S.E.2d 736 (2006).

In a personal injury action arising from an auto accident filed two days before the expiration of the applicable statute of limitation, because the record failed to show that the plaintiff acted with the greatest possible diligence to personally serve the defendant, the trial court did not abuse its discretion in dismissing the plaintiff's complaint based on insufficient service of process. *Moody v. Gilliam*, 281 Ga. App. 819, 637 S.E.2d 759 (2006).

Because a husband and wife failed to show what efforts they took in exercising due diligence in serving a driver close to the running of the relevant statute of limitations under O.C.G.A. § 9-3-33, their personal injury claim was properly dismissed, but the wife's loss of consortium claim survived. *Parker v. Silvano*, 284 Ga. App. 278, 643 S.E.2d 819 (2007).

Although a personal injury litigant hired a "skip tracer," and received the report the next day, because that litigant neglected to attempt to move for an order for service by publication until almost two weeks later, and did not secure the order until over a month after that, and, there was no evidence of any contact between the litigant during the interim, the trial court did not err in finding that the litigant did not exercise the greatest possible diligence; moreover, a finding that the litigant exercised the requisite due diligence to authorize service by publication did not compel a finding that the litigant exercised the greatest possible diligence in serving the opposing party personally

three months after the opposing party filed an answer, and nearly four months after the statute of limitation had run. *Green v. Cimafranca*, 288 Ga. App. 16, 653 S.E.2d 782 (2007).

In a family's lawsuit against a driver after a collision, the trial court properly granted the driver summary judgment based on insufficient service of process. Once the driver filed an answer asserting insufficient service, the family was obligated to exercise the greatest possible diligence in effecting service, but they had not explained their lack of diligence other than by a late-filed affidavit. *Abimbola v. Pate*, 291 Ga. App. 769, 662 S.E.2d 840 (2008).

Judicial determination of diligence.

Trial court erred in dismissing a client's legal malpractice action on the ground that the client did not act with reasonable diligence in serving the attorney because it failed to consider the client's efforts at service outside the five-day period of O.C.G.A. § 9-11-4(c); the record presented a number factual issues that had to be resolved in determining whether the client exercised the appropriate diligence in perfecting service on the attorney or whether the client was guilty of laches, but the trial court failed to address those issues under the appropriate standards. *Cleveland v. Katz*, 311 Ga. App. 880, 717 S.E.2d 500 (2011).

Reasonable diligence not shown.

Because the evidence presented before the trial court failed to show that an injured passenger exercised either reasonable diligence or the greatest possible diligence in attempting service of process on an opposing driver, but instead showed that: (1) numerous attempts at service were unsuccessful; (2) the passenger filed the complaint eight days before the expiration of the limitation period, and service was not perfected until 16 months after the statute ran; (3) long lapses in time existed between failed attempts where apparently no actions were taken to effectuate service; and (4) the driver continued to reside in the same small community during the 16 months that it took to ultimately perfect service, the trial court did not err in granting summary judgment.

ment to the driver. *Moore v. Wilkerson*, 283 Ga. App. 340, 641 S.E.2d 578 (2007).

Bankruptcy trustee's late service on a driver did not relate back to the filing of the personal injury complaint where the trustee failed to show that the trustee reasonably and diligently insured that service was made as quickly as possible after the driver made the trustee aware of the driver's true residence. *Webster v. Western Express, Inc.*, No. 5:05-CV-350 (WDO), 2007 U.S. Dist. LEXIS 70011 (M.D. Ga. Sept. 21, 2007).

A complaint against a defendant who was never served was properly dismissed for insufficient service of process because the affidavit did not contain sufficient dates or a chronology to show that diligence had been exercised. The record did not show that the plaintiff had diligently pursued service on an ongoing basis or whether there were any unreasonable lapses in time during this period when no efforts were made. *Montague v. Godfrey*, 289 Ga. App. 552, 657 S.E.2d 630 (2008).

Service perfected. — Trial court had jurisdiction over a home inspector, and the inspector was required under the Georgia Civil Practice Act, O.C.G.A. § 9-11-12(a), to file an answer to the purchaser's complaint within 30 days, but because the inspector failed to do so, the inspector was in default; the caption of the purchaser's original complaint named both the inspector and another as defendants, and because the purchaser obtained a summons against the inspector when the purchaser filed a duplicate of the complaint, and service was effected upon the inspector five days later, the new summons could have perfected the filing of the purchaser's action against the inspector and allowed for the inspector to be served, but the absence of a summons for the inspector at the time of the original filing did not change the fact that the inspector was named as a defendant in the original suit. *Strickland v. Leake*, 311 Ga. App. 298, 715 S.E.2d 676 (2011).

Failure to perfect service within statute of limitations. — Trial court was presented with evidence sufficient to support the court's judgment dismissing the appellant's complaint against appellee for failure to perfect service of process

because appellant failed to serve appellee within five days of the two-year statute of limitations, O.C.G.A. § 9-3-33; appellee proffered evidence that: (1) the appellee did not reside in the town where service was allegedly made at the time service was attempted; (2) the appellee's brother resided at that address during the relevant time period; (3) the appellee's brother advised the appellee of appellant's complaint after being provided with a copy of the complaint by the process server; and (4) the appellee also presented evidence from the appellee's landlord confirming that the appellee had lived at a different residence. *Jones v. Lopez-Herrera*, 308 Ga. App. 81, 706 S.E.2d 609 (2011).

Court erred in calculating five-day period. — Trial court erred in calculating the five-day period under O.C.G.A. § 9-11-4(c) for service of a client's complaint because the provisions of O.C.G.A. § 1-3-1(d)(3) applied since the five-day requirement was less than seven days; because the client filed the complaint on Friday, August 14, 2009, the client had until Friday, August 21, 2009, in which to achieve service in accordance with O.C.G.A. § 9-11-4(c) since the intervening Saturday and Sunday, August 15 and 16, 2009, were excluded from the calculation of the five-day period. *Cleveland v. Katz*, 311 Ga. App. 880, 717 S.E.2d 500 (2011).

Waiver

Waiver of service.

Although a father never filed a written response to a change of custody petition, a claim that the court lacked personal jurisdiction was waived based on the father's appearance at both the temporary hearing and at the final hearing; moreover, the father waived any claim regarding the insufficiency of process or service of process. *Jones v. Van Horn*, 283 Ga. App. 144, 640 S.E.2d 712 (2006).

Defective Service

Evidence of defective service.

As the evidence showed that a subcontractor had actual knowledge of a limited liability company's (LLC's) business address when the subcontractor filed suit, but did not try to serve the LLC's officers, employees, or agents at that address, or

explain why the subcontractor could not do so, substituted service on the Georgia Secretary of State's Office was not authorized by O.C.G.A. § 9-11-4(e)(1). *Anthony Hill Grading, Inc. v. SBS Invs., LLC*, 297 Ga. App. 728, 678 S.E.2d 174 (2009).

Attack of judgment for lack of service.

An order terminating an out-of-state incarcerated parent's parental rights was reversed, as: (1) service of the termination petition and summons upon the parent via certified mail was insufficient under both O.C.G.A. § 15-11-96(c) and O.C.G.A. § 9-11-4; (2) a correctional officer who personally delivered the documents to the parent did not amount to sufficient and lawful personal service, as the officer lacked the inherent authority to perfect service under O.C.G.A. § 9-11-4(c) and no court order existed to grant authority; and (3) the trial court's reliance on the service provisions of O.C.G.A. § 15-11-39.1, a statute dealing with service in juvenile court proceedings generally, was misplaced. *In the Interest of C.S.*, 282 Ga. 7, 644 S.E.2d 812 (2007).

Service by publication in custody proceeding inadequate. — Trial court erred in entering a finding of contempt against a mother and in changing custody of a child from the mother to the father because the court lacked personal jurisdiction over the mother due to insufficient service of process; the trial court erred in granting the father's motion to serve the mother by publication because the father's search for the mother was legally inadequate, and the father had the mother's cell phone number, email address, and mailing address. *Coker v. Moemekka*, 311 Ga. App. 105, 714 S.E.2d 642 (2011).

Personal Service

1. In General

Evasion of process.

Trial court did not err in concluding that the debtors had been properly served pursuant to O.C.G.A. §§ 9-11-4 and 44-14-161(c) because there was undisputed evidence from which the trial court could have concluded that the debtors were attempting to evade service; a private process server, who had a description

of a vehicle that had been parked at the address of one of the debtors, saw the vehicle and followed the vehicle, but the driver noticed the server, drove past the address of the house, and when the server pulled into the driveway after the driver and approached the garage door, which was not yet closed, and announced that the server had papers, no one responded. *Winstar Dev., Inc. v. SunTrust Bank*, 308 Ga. App. 655, 708 S.E.2d 604 (2011).

2. Corporations

Registered agent of corporation.

In five consolidated aviation wrongful death cases and one aviation property case, the trial court properly denied the motion to dismiss filed by an out-of-state damper part seller on the ground of insufficient service of process as personal service upon the seller's registered agent was appropriate under both the seller's State of Delaware and under Georgia law. *Vibratech, Inc. v. Frost*, 291 Ga. App. 133, 661 S.E.2d 185 (2008).

Service on Secretary of State.

Because a contractor presented sufficient evidence showing that an assignee that sued it had actual knowledge through its assignor of the contractor's physical address, yet failed to attempt service at that address before serving the Secretary of State, the trial court erred in denying the contractor's motion to set aside the default judgment entered in favor of the assignee. *TC Drywall & Plaster, Inc. v. Express Rentals, Inc.*, 287 Ga. App. 624, 653 S.E.2d 70 (2007).

Service upon a receptionist, etc.

In a worker's suit against a corporation, there was evidence supporting the finding that service had not been perfected; the worker had not shown that the receptionist who allegedly received the complaint had managerial or supervisory responsibility, and the registered agent testified that the agent had never authorized the receptionist to receive service of process. *Aikens v. Brent Scarbrough & Co.*, 287 Ga. App. 296, 651 S.E.2d 214 (2007).

Service of process held sufficient.

Because a corporation failed in the corporation's burden of showing that the person who actually received service of process was not authorized to accept service on

behalf of the corporation's registered agent, the service was properly found to be sufficient. Thus, the trial court was not required to dismiss the action based on a lack of sufficient service of process. *Holmes & Co. v. Carlisle*, 289 Ga. App. 619, 658 S.E.2d 185 (2008).

O.C.G.A. § 9-11-4(e)(1) did not govern service of process in a manufacturer's breach of contract action against a distributor because the distributor was not "authorized to transact business in the State" as that phrase was used in O.C.G.A. § 9-11-4(e)(1); the distributor did not show that the distributor was a corporation incorporated or domesticated under the laws of Georgia, because the distributor pointed to no evidence that the distributor obtained the requisite certificate of authority to transact business in the state from the Georgia Secretary of State pursuant to O.C.G.A. § 14-2-1501(a) and because the distributor was a nonresident subject to the long-arm statute, O.C.G.A. § 9-10-90 et seq. *Kitchen Int'l, Inc. v. Evans Cabinet Corp.*, 310 Ga. App. 648, 714 S.E.2d 139 (2011).

7. Service at Dwelling House or Usual Place of Abode

Service on resident at address listed on return of service held sufficient. — Service of process to a person at least 15 years old who resided at the residence listed on the return of service was sufficient; moreover, adequate and proper service of process was presumed given that the party charged with service timely filed an answer. *Holmes & Co. v. Carlisle*, 289 Ga. App. 619, 658 S.E.2d 185 (2008).

Service at father's residence.

In a personal injury action, service on the driver's father was not effective service on the driver under O.C.G.A. § 9-11-4(e)(7) where the place of service was not the driver's dwelling house or usual place of abode. *Webster v. Western Express, Inc.*, No. 5:05-CV-350 (WDO), 2007 U.S. Dist. LEXIS 70011 (M.D. Ga. Sept. 21, 2007).

8. Agents

Service on city attorney. — Service of process was properly effectuated on a city

when the city attorney was personally served because the sole provision of the city's charter regarding service of process provided that the city attorney was authorized to acknowledge service of any suit against the city; not only was evidence presented that the city attorney held oneself out to the process server as someone who could accept service on behalf of the city, the attorney's paralegal, the city clerk, and the office manager for the chief of police all claimed that the city attorney was authorized to accept service of process on the city's behalf and that anyone seeking to serve the city would be directed to the city attorney, and the city's mayor also acknowledged that the mayor designated the city attorney to accept service of process and that the mayor instructed persons seeking to serve the city not to provide the summons and complaint to the mayor but rather to serve the summons and complaint upon the city attorney. *City of East Point v. Jordan*, 300 Ga. App. 891, 686 S.E.2d 471 (2009), cert. denied, No. S10C0494, 2010 Ga. LEXIS 337 (Ga. 2010).

Service on company's agent sufficient. — Catamaran purchasers' service of process was sufficient as to the company because under O.C.G.A. § 9-11-4(e)(7) personal service upon a business association could only be accomplished by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process. Because the company and the agent, as the moving party, had the initial burden of producing affidavits that demonstrated the absence of sufficient service of process before shifting the burden to the purchasers to demonstrate that service was proper, and because the company and the agent failed to meet that initial burden, the court rejected the company and the agent's argument that service of process was insufficient as to the company. *Carrier v. Jordaen*, No. CV208-068, 2008 U.S. Dist. LEXIS 114596 (S.D. Ga. Oct. 17, 2008).

Service on sheriff's captain insufficient service on deputy. — Where a complaint was delivered to a sheriff's captain who delivered it to the deputy named as a defendant in the complaint, service

upon the deputy was insufficient since the prohibition against disclosure of the home address of a law enforcement officer under O.C.G.A. § 50-18-72 did not validate the delivery to the captain as service under O.C.G.A. § 9-11-4(e)(7). *Melton v. Wiley*, No. 07-10959, 2008 U.S. App. LEXIS 1069 (11th Cir. Jan. 15, 2008) (Unpublished).

Service by Publication

Service by publication improper on LLC. — Default judgment in favor of a limited liability company (LLC) against a second LLC was void because the trial court erred in allowing service by publication. Although service was attempted on the second LLC's registered agent without success, the first LLC did not show why service could not be had at the second LLC's address on one of the other persons listed in the statute; the first LLC had actual knowledge of the second LLC's business address and had even attempted service there; and even if the first LLC had attempted unsuccessfully to serve another person at the second LLC's principal place of business, service by publication would not have been proper because personal service through the Secretary of State could have been made. *Brock Built City Neighborhoods, LLC v. Century Fire Prot., LLC*, 295 Ga. App. 205, 671 S.E.2d 240 (2008).

Compliance with subparagraph (f)(1)(A). — Because the moving party complied with O.C.G.A. § 9-11-4(f)(1)(A) in obtaining the order for service by publication and the opponents failed to object to the movant's affidavit, the trial court did not err in ordering service by publication. *Mateen v. Dicus*, 286 Ga. App. 760, 650 S.E.2d 272 (2007), 129 S. Ct. 89, 172 L.Ed.2d 30 (2008).

Requirements of publication not met. — Trial court erred when the court found that a debtor was served properly because there was no evidence that the requirements of publication under O.C.G.A. § 9-11-4(f)(1) were met, and a bank offered no evidence to show that the notice requirements of O.C.G.A. § 44-14-161(c) were met; the published advertisement for service on the debtor provided no specifics as to the date or time of the confirmation hearing as was re-

quired under the confirmation statute, O.C.G.A. § 44-14-161. *Winstar Dev., Inc. v. SunTrust Bank*, 308 Ga. App. 655, 708 S.E.2d 604 (2011).

Service by publication in deprivation proceeding. — Juvenile court erred in granting service by publication of the paternal grandparents' petition alleging that the mother's children were deprived because the grandparents failed to exercise reasonable diligence to find the mother, the juvenile court concluded that the mother could not be found with due diligence within the State of Georgia without any competent evidence to support that finding, and the juvenile court failed to place any burden on the grandparents to determine what notice they had given to the mother of their deprivation petition and simply relied on evidence about the father's efforts to contact her; the grandparents did not file a written motion for service by publication and supporting affidavit as required by O.C.G.A. § 9-11-4(f)(1)(A), they had some means of communicating with the mother because the father had the mother's telephone number and was able to notify the mother by phone of the 72-hour hearing, the grandparents could have contacted the mother's relatives to ascertain the mother's whereabouts, and they could have attempted to serve the mother personally or by registered or certified mail at the mother's prior address. *Taylor v. Padgett*, 300 Ga. App. 314, 684 S.E.2d 434 (2009).

Service by Mail

Service by certified mail, etc.

In a negligence action filed by an injured driver against an insured and an insurer, the trial court did not err in dismissing the injured driver's complaint after the record revealed that: (1) the insured was never served with process and service upon the insurer via certified mail was inadequate; (2) no privity of contract existed among the parties; (3) no unsatisfied judgment against the insured existed; and (4) no statute or provision in the insurance policy permitted the suit. *Crane v. Lazaro*, 281 Ga. App. 127, 635 S.E.2d 319 (2006), cert. denied, 2006 Ga. LEXIS 907 (Ga. 2006); cert. dismissed,

mot. denied, 549 U.S. 1200, 127 S. Ct. 1278, 167 L. Ed. 2d 69 (2007).

Nonresidents; Residents Outside State

Personal service required for in personam judgments against nonresidents.

When paternal grandparents petitioned for visitation rights, the parent of the child was not properly served with process under O.C.G.A. § 9-11-4(e)(7), because the parent had moved to Arizona to attend college, but the sheriff's deputy made service upon the maternal grandparent in Georgia, even though the maternal grandparent told the deputy that the parent had moved to Arizona. The parent should have been served personally, or by leaving copies thereof at the parent's dwelling house or usual place of abode. *Oglesby v. Deal*, 311 Ga. App. 622, 716 S.E.2d 749 (2011).

Amendment of defectively served complaint.

Because international service of process against an automobile manufacturer was properly effectuated by registered mail under the Hague Convention, the manufacturer's motion to dismiss the action based on improper service of process was properly denied; moreover, as the manufacturer refused to acknowledge service of the renewal third-party complaint, even though it had done so in the initial action, and given that the address used in the initial action was apparently incorrect, that leave of court to use a special process server upon discovering the problem was granted, that service by registered mail using the correct address was effectuated, and that perfected personal service was ultimately obtained, a due diligence finding was proper. *Mitsubishi Motors Corp. v. Coleman*, 290 Ga. App. 86, 658 S.E.2d 843 (2008).

Service of process proper on out of state resident. — Defendant failed to make an affirmative showing that the trial court lacked personal jurisdiction on the ground that service of process upon the defendant was insufficient because although the defendant contended that the service made upon the defendant failed to comply with the provisions of the Civil Practice Act, O.C.G.A. § 9-11-4(f)(2),

service of process outside the state upon state residents was subject to the service-of-process requirements of the Act, and the record supported the trial court's conclusion that the defendant was a non-resident of Georgia; the record did not suggest, and the defendant did not argue, that the defendant was a resident of the state, and the service complied with the provisions of the Long Arm Statute, O.C.G.A. § 9-10-91 et seq. *Haamid v. First Franklin Fin. Corp.*, 299 Ga. App. 828, 683 S.E.2d 891 (2009).

Given service on an Alabama resident by a private process server who verified the resident's identity through a closed door at the resident's residence before leaving the papers at the door as instructed, a trial court did not err in finding that service was proper under O.C.G.A. § 9-10-94 and striking the resident's untimely answer. The timing of the filing of the return of service was not relevant under O.C.G.A. § 9-11-4(h). *Newsome v. Johnson*, 305 Ga. App. 579, 699 S.E.2d 874 (2010).

Proof of Service

Burden on plaintiff to show diligence.

In a personal injury lawsuit, because, as a matter of law, an injured individual failed to carry the burden of showing that a reasonable diligence in attempting to serve the complaint, the trial court abused its discretion in denying a motion to dismiss said complaint; moreover, despite the individual's attempt to argue to the contrary, the applicable test was whether the plaintiff exercised due diligence, not whether the defendant had suffered harm from the delay in service of process. *Duffy v. Lyles*, 281 Ga. App. 377, 636 S.E.2d 91 (2006).

Diligence in serving opposing party not shown.

There was no abuse of discretion by a trial court's dismissal of a personal injury action by a plaintiff against a defendant due to lack of service and expiration of the limitations period as the plaintiff did not exercise reasonable diligence in attempting to serve the defendant because, although it appeared that the defendant was evading service, the plaintiff did not

seek an order to serve by publication under O.C.G.A. § 9-11-4(f)(1)(A); further, there was no indication that the greatest possible diligence was exhibited upon the defendant's filing of a motion to dismiss the complaint due to lack of service. *Atcheson v. Cochran*, 297 Ga. App. 568, 677 S.E.2d 749 (2009).

Alternative Service

Application for contempt, etc.

Motion to dismiss for improper service under Fed. R. Civ. P. 4(h) was denied because a consumer attempted service on a business's registered agent on three occasions, and when those attempts failed the consumer had reason to believe the business was evading service, as it had done on prior occasions, and the consumer proceeded with substitute service pursuant to O.C.G.A. § 9-11-4(e)(1). *Davis v. Frederick J. Hanna & Assocs., P.C.*, 506 F. Supp. 2d 1322 (N.D. Ga. 2007).

Special Statutory Proceedings

Prescription of alternate service by court unavailable where another method specified.

Court of appeals correctly reversed a

trial court's grant of summary judgment to a driver and a corporation based on a second driver's lack of diligence in serving the second driver's complaint in the driver's voluntarily dismissed original action because the supreme court previously held that inasmuch as diligence in perfecting service of process in an action properly refiled under O.C.G.A. § 9-2-61(a) had to be measured from the time of filing the renewed suit, any delay in service in a valid first action was not available as an affirmative defense in the renewal action; the first driver and corporation essentially sought the rewriting of an unambiguous statute, but their arguments were properly directed to the General Assembly because when the General Assembly wished to put a firm deadline on filing lawsuits, the legislature knew how to enact a statute of repose instead of a statute of limitation. *Robinson v. Boyd*, 288 Ga. 53, 701 S.E.2d 165 (2010).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 20A Am. Jur. Pleading and Practice Forms, Process, §§ 3, 13, 24, 46, 62, 82, 107, 140.

9-11-4.1. Certified process servers; procedure for becoming a certified process server; defining crime of impersonating a process server; punishment; sunset.

(a) **Certified process servers.** A person at least 18 years of age who files with a sheriff of any county of this state an application stating that the movant complies with this Code section and any procedures and requirements set forth in any rules or regulations promulgated by the Judicial Council of Georgia regarding this Code section shall, absent good cause shown, be certified as a process server. Such certification shall be effective for a period of three years or until such approval is withdrawn by a superior court judge upon good cause shown, whichever shall first occur. Such certified process server shall be entitled to serve in such capacity for any court of the state, anywhere within the state, provided that the sheriff of the county for which process is to be served allows such servers to serve process in such county.

(b) **Certification procedures.**

(1) Any person seeking certification under this Code section shall upon applying for certification present evidence that he or she:

(A) Has undergone a criminal record check based on fingerprints and has never been convicted of a felony or of impersonating a peace officer or other public officer or employee under Code Section 16-10-23;

(B) Completed a 12 hour course of instruction relating to service of process which course has been approved by the Administrative Office of the Courts in consultation with the Georgia Sheriffs' Association;

(C) Passed a test approved by the Administrative Office of the Courts which will measure the applicant's knowledge of state law regarding serving of process and other papers on various entities and persons;

(D) Obtained a commercial surety bond or policy of commercial insurance conditioned to protect members of the public and persons employing the certified process server against any damage arising from any actionable misconduct, error, or omission on the part of the applicant while serving as a certified process server; and

(E) Is a citizen of the United States.

(2) A sheriff of any county of this state shall review the application, test score, criminal record check, and such other information or documentation as required by that sheriff and determine whether the applicant shall be approved for certification and authorized to act as a process server in this state.

(3) Upon approval the applicant shall complete a written oath as follows: "I do solemnly swear (or affirm) that I will conduct myself as a process server truly and honestly, justly and uprightly, and according to law; and that I will support the Constitution of the State of Georgia and the Constitution of the United States. I further swear (or affirm) that I will not serve any papers or process in any action where I have a financial or personal interest in the outcome of the matter or where any person to whom I am related by blood or marriage has such an interest."

(c) **Renewal and revocation of certification.** A certified process server shall be required to renew his or her certification every three years. Any certified process server failing to renew his or her certification shall no longer be approved to serve as a certified process server. At the time of renewal, the certified process server shall provide evidence that he or she has completed three annual five-hour courses of continuing education which courses have been approved by the Administrative Office of the Courts and has undergone an updated criminal record

check. The certification of a process server may be revoked or suspended by a superior court judge for cause at any time. If a complaint has been filed by a sheriff alleging serious misconduct by the process server, such judge may suspend the certification for up to five business days while the matter is considered by the judge.

(d) **Fees.** The sheriff shall collect a fee of \$80.00 for processing the application required by this Code section.

(e) **Registry.** The sheriff shall forward \$30.00 of each fee received to the Georgia Sheriffs' Association. The Georgia Sheriffs' Association shall maintain a registry of certified process servers.

(f) **Service by off-duty deputy sheriff.** An off-duty deputy sheriff may serve process with the approval of the sheriff by whom he or she is employed and shall be exempt from certification under this Code section.

(g) **Impersonation of public officer or employee.** It shall be unlawful for a certified process server to falsely hold himself or herself out as a peace officer or public officer or employee and any violation shall be punished as provided in Code Section 16-10-23.

(h) **Notice to sheriff.** (1) Prior to the first time that a certified process server serves process in any county he or she shall file with the sheriff of the county a written notice, in such form as shall be prescribed by the Georgia Sheriffs' Association, of his or her intent to serve process in that county. Such notice shall only be accepted by a sheriff who allows certified process servers to serve process in his or her county. Such notice shall be effective for a period of one year; and a new notice shall be filed before the certified process server again serves process in that county after expiration of the one-year period.

(2) The provisions of this subsection shall not apply to a certified process server who was appointed by the court to serve process or who was appointed as a permanent process server by a court.

(i) **Credentials.** A sheriff of any county of this state shall at the time of certification provide credentials in the form of an identification card to each certified process server. The identification card shall be designed to clearly distinguish it from any form of credentials issued to certified peace officers and will not be in the shape or form of a law enforcement badge. A certified process server shall display his or her credentials at all times while engaged in the service of process.

(j) **False representation.** It shall be unlawful for any person who is not a certified process server to hold himself or herself out as being a certified process server. Any person who violates this subsection shall upon conviction be guilty of a misdemeanor.

(k) **Sunset and legislative review.** This Code section shall be repealed effective July 1, 2015, unless continued in effect by the General Assembly prior to that date. At its 2013 regular session the General Assembly shall review this Code section to determine whether it should be continued in effect. (Code 1981, § 9-11-4.1, enacted by Ga. L. 2010, p. 822, § 5/SB 491.)

Effective date. — This Code section law on trial practice and procedure, see 62 became effective July 1, 2010. Mercer L. Rev. 339 (2010).

Law reviews. — For annual survey of

9-11-5. Service and filing of pleadings subsequent to the original complaint and other papers.

(a) **Service — When required.** Except as otherwise provided in this chapter, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties. However, the failure of a party to file pleadings in an action shall be deemed to be a waiver by him or her of all notices, including notices of time and place of trial and entry of judgment, and all service in the action, except service of pleadings asserting new or additional claims for relief, which shall be served as provided by subsection (b) of this Code section.

(b) **Same — How made.** Whenever under this chapter service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the person to be served or by mailing it to the person to be served at the person's last known address or, if no address is known, by leaving it with the clerk of the court. As used in this Code section, the term "delivery of a copy" means handing it to the person to be served or leaving it at the person to be served's office with a person in charge thereof or, if such office is closed or the person to be served has no office, leaving it at the person to be served's dwelling house or usual place of abode with some person of suitable age and discretion residing therein. "Delivery of a copy" also means transmitting a copy via e-mail in portable document format (PDF) to the person to be served using all e-mail addresses provided pursuant to subsection (f) of this Code section and showing in the subject line of the e-mail message the words "STATUTORY ELECTRONIC SERVICE" in capital letters. Service by mail is complete upon mailing. Proof of service may be made by certificate of an attorney or of his or her employee, by written admission, by affidavit, or by other proof

satisfactory to the court. Failure to make proof of service shall not affect the validity of service.

(c) **Same — Numerous defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants, and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties, and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) **Filing.** All papers after the complaint required to be served upon a party shall be filed with the court within the time allowed for service.

(e) **“Filing with the court” defined.** The filing of pleadings and other papers with the court as required by this chapter shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(f) **Electronic service of pleadings.**

(1) A person to be served may consent to being served with pleadings electronically by:

(A) Filing a notice of consent to electronic service and including the person to be served’s e-mail address or addresses in such pleading; or

(B) Including the person to be served’s e-mail address or addresses in or below the signature block of the complaint or answer, as applicable to the person to be served.

(2) A person to be served may rescind his or her election to be served with pleadings electronically by filing and serving a notice of such rescission.

(3) If a person to be served agrees to electronic service of pleadings, such person to be served bears the responsibility of providing notice of any change in his or her e-mail address or addresses.

(4) If electronic service of a pleading is made upon a person to be served, and such person certifies to the court under oath that he or she did not receive such pleading, it shall be presumed that such pleading was not received unless the serving party disputes the assertion of nonservice, in which case the court shall decide the issue of service of such pleading. (Ga. L. 1966, p. 609, § 5; Ga. L. 1967, p. 226, § 4; Ga. L. 2001, p. 854, § 1; Ga. L. 2009, p. 73, §§ 1, 2/HB 29.)

The 2009 amendment, effective July 1, 2009, substituted the present provisions of subsection (b) for the former provisions, which read: "Same — How made. Whenever under this chapter service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. As used in this Code section, the term 'delivery of a copy' means handing it to the attorney or to the party, or leaving it at his office with his clerk or other person in charge thereof or, if the office is closed or the person to be served

has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. Proof of service may be made by certificate of an attorney or of his employee, by written admission, by affidavit, or by other proof satisfactory to the court. Failure to make proof of service shall not affect the validity of service."; and added subsection (f). See the Editor's note for applicability.

Editor's notes. — Ga. L. 2009, p. 73, § 5, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to motions to dismiss filed after July 1, 2009.

Law reviews. — For annual survey of law on domestic relations, see 62 Mercer L. Rev. 105 (2010).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

HOW SERVICE MADE

PROOF OF SERVICE

FILING

WAIVER OF NOTICE

General Consideration

Cited in *Rouse v. Arrington*, 283 Ga. App. 204, 641 S.E.2d 214 (2007); *Rouse v. Arrington*, 283 Ga. App. 204, 641 S.E.2d 214 (2007); *Weaver v. State*, 299 Ga. App. 718, 683 S.E.2d 361 (2009); *Mitchell v. Cancer Carepoint, Inc.*, 299 Ga. App. 881, 683 S.E.2d 923 (2009).

How Service Made

Service by mail proper when case proceeded as pending action. — Court properly confirmed the foreclosure sales because the case proceeded as a pending action, not an entirely new action and service of all subsequent pleadings and written notices were authorized to be made by mail in accordance with O.C.G.A. § 9-11-5(b). Following entry of the remittitur from the first case, the matter was reinstated in the trial court and was returned to the posture the matter occupied prior to judgment. *Belans v. Bank of Am., N.A.*, 309 Ga. App. 208, 709 S.E.2d 853 (2011).

Service complete upon mailing.

When a party opposing summary judgment filed an affidavit and served the affidavit by mail the same day, one day before the summary judgment hearing as required by O.C.G.A. § 9-11-56(c), the affidavit was not untimely; under O.C.G.A. § 9-11-5(b), service by mail was complete upon mailing. *Kirkland v. Kirkland*, 285 Ga. App. 238, 645 S.E.2d 626 (2007), cert. denied, 2007 Ga. LEXIS 646 (Ga. 2007); 552 U.S. 1312, 128 S. Ct. 1898, 170 L.Ed.2d 749 (2008).

Proof of Service

Service not invalidated by incorrect certificate. — Fact that a defendant's attorney incorrectly indicated on a certificate of service that service of a motion to dismiss had been made by mail when it was made electronically was of no legal consequence and did not invalidate the service, pursuant to O.C.G.A. § 9-11-5(b). *Worley v. Winter Constr. Co.*, 304 Ga. App. 206, 695 S.E.2d 651 (2010).

Insufficient evidence that parties properly served with notice of summary judgment hearing. — Summary judgment order was vacated because the record contained insufficient evidence upon which the court of appeals could base a decision; the record contained no rule nisi or other evidence indicating that the parties were properly served with notice of the summary judgment hearing date pursuant to O.C.G.A. §§ 9-11-5(b) and 9-11-6(d), and there was no indication in the record that a transport company actually received notice, although its notice of appeal asked the trial court clerk to omit nothing from the record on appeal. *Sprint Transp. Group, Inc. v. China Shipping NA Agency, Inc.*, 313 Ga. App. 454, 721 S.E.2d 659 (2011).

Filing

Filing means filing with clerk of court, etc.

Despite the claim by the owners of a corporation that the trial court erred in refusing to allow them to intervene in the case as the true owners of the property in question, because the owners never properly filed or asserted a motion to intervene, no error resulted; moreover, their argument that the trial court erred in

refusing to allow them to file their motion to intervene also provided no basis for relief. *Rice v. Champion Bldgs., Inc.*, 288 Ga. App. 597, 654 S.E.2d 390 (2007), cert. denied, 2008 Ga. LEXIS 326 (Ga. 2008).

Waiver of Notice

Where defendant failed to answer the complaint, etc.

No reversible error was found because a contestant in a quiet title action waived service of process, neglected to file any pleadings, and failed to file a record to support the claims of error on appeal, and given that the special master found three independent bases, which on their face supported the judgment entered. *Brown v. Fokes Props. 2002, Inc.*, 283 Ga. 231, 657 S.E.2d 820 (2008).

Although a default judgment was not permissible in a divorce case, O.C.G.A. § 19-5-8, a trial court did not err in entering a judgment of divorce on the pleadings pursuant to O.C.G.A. § 19-5-10(a) after a defendant failed to file responsive pleadings, thereby waiving notice of the hearing under O.C.G.A. § 9-11-5. The trial court properly relied on the plaintiff's verified complaint and domestic relations affidavit in dividing the parties' property. *Ellis v. Ellis*, 286 Ga. 625, 690 S.E.2d 155 (2010).

RESEARCH REFERENCES

ALR. — Service of process via computer or fax, 30 ALR6th 413.

9-11-6. Time.

(a) **Computation.** In computing any period of time prescribed or allowed by this chapter, by the rules of any court, by order of court, or by an applicable statute, the computation rules prescribed in paragraph (3) of subsection (d) of Code Section 1-3-1 shall be used.

(b) **Extension of time.** When by this chapter or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the parties, by written stipulation of counsel filed in the action, may extend the period, or the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period extended if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the

specified period, permit the act to be done where the failure to act was the result of excusable neglect; provided, however, that no extension of time shall be granted for the filing of motions for new trial or for judgment notwithstanding the verdict.

(c) **Unaffected by expiration of term.** The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court, except as otherwise specifically provided by law. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it, except as otherwise specifically provided by law.

(d) **For motions; for affidavits.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by this chapter or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion. Opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

(e) **Additional time after service by mail or e-mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper, other than process, upon him or her, and the notice or paper is served upon the party by mail or e-mail, three days shall be added to the prescribed period. (Ga. L. 1966, p. 609, § 6; Ga. L. 1967, p. 226, §§ 5, 6; Ga. L. 1985, p. 648, § 2; Ga. L. 2009, p. 73, § 3/HB 29.)

The 2009 amendment, effective July 1, 2009, in subsection (e), inserted “or e-mail” twice, inserted “or her”, and substituted “the party” for “him”. See Editor’s note for applicability.

Editor’s notes. — Ga. L. 2009, p. 73, § 5, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to motions to dismiss filed after July 1, 2009.

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- EXTENSION OF TIME
- MOTIONS AND AFFIDAVITS
 - 1. IN GENERAL
 - 2. SUMMARY JUDGMENT PROCEEDINGS

General Consideration

Inapplicable to judicial review of medicaid determination. — Georgia Civil Practice Act’s three-day rule under

O.C.G.A. § 9-11-6(e) was inapplicable to a determination of timeliness with respect to a petition for judicial review of a Medicaid applicant’s claim for benefits, pursu-

ant to O.C.G.A. § 50-13-19; similarly, the certified mail rule under O.C.G.A. § 50-13-23 was expressly deemed inapplicable pursuant to O.C.G.A. § 49-4-153(c), and accordingly, the applicant's petition was properly denied as untimely. *Gladowski v. Dep't of Family & Children Servs.*, 281 Ga. App. 299, 635 S.E.2d 886 (2006).

Cited in *Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625, 658 S.E.2d 178 (2008); *Clawson v. Intercat, Inc.*, 294 Ga. App. 624, 669 S.E.2d 671 (2008); *Laurel Baye Healthcare of Macon, LLC v. Neubauer*, No. A11A2367; No. A11A2368, 2012 Ga. App. LEXIS 335 (Mar. 26, 2012).

Extension of Time

Judicial discretion to extend time.

In a summary judgment action, while O.C.G.A. § 9-11-6(b) permitted late service of affidavits in support of a motion, in giving such permission, the trial court was not required to make a written finding of excusable neglect; accordingly, the court was not required to state its basis for finding excusable neglect. *Green v. Bd. of Dirs. of Park Cliff Unit Owners Ass'n*, 279 Ga. App. 567, 631 S.E.2d 769 (2006).

Excusable neglect.

Pursuant to O.C.G.A. § 9-11-36(b), a trial court properly granted a bank a one-day extension to respond to a request to admit after the bank served the bank's response one day late because the trial court found excusable neglect based on the bank's counsel's mistaken belief that the opposing party's counsel had granted a one-day extension in which to respond. *131 Ralph McGill Blvd., LLC v. First Intercontinental Bank*, 305 Ga. App. 493, 699 S.E.2d 823 (2010).

Motions and Affidavits

1. In General

Notice of trial. — Denial of motion to set aside a default judgment against a corporation was not an abuse of discretion as the trial was properly noticed by publication of the trial calendar in the county's legal gazette; publication of a court calendar in the county's legal organ of record was sufficient notice to the parties to appear. *Migmar, Inc. v. Williams*, 281 Ga. App. 870, 637 S.E.2d 471 (2006).

Insufficient evidence that parties properly served with notice of summary judgment hearing. — Summary judgment order was vacated because the record contained insufficient evidence upon which the court of appeals could base a decision; the record contained no rule nisi or other evidence indicating that the parties were properly served with notice of the summary judgment hearing date pursuant to O.C.G.A. §§ 9-11-5(b) and 9-11-6(d), and there was no indication in the record that a transport company actually received notice, although its notice of appeal asked the trial court clerk to omit nothing from the record on appeal. *Sprint Transp. Group, Inc. v. China Shipping NA Agency, Inc.*, 313 Ga. App. 454, 721 S.E.2d 659 (2011).

Untimely filing of affidavits in response. — A married couple who brought a professional malpractice suit against a hospital authority and a physical therapist did not timely respond to renewed motions to dismiss, but waited almost a year to file the couple's response. Because the response was patently untimely under Ga. Unif. Super. Ct. R. 6.2 and without leave of court to be filed late, the trial court did not abuse the court's discretion when the court struck the response as well as an expert's new affidavit under O.C.G.A. § 9-11-6(d). *Cogland v. Hosp. Auth.*, 290 Ga. App. 73, 658 S.E.2d 769 (2008).

Second affidavit properly considered. — In a breach of contract action between a business and an advertiser, while the best evidence rule required the advertiser to produce the first affidavit provided by the advertiser's senior director of business affairs, and the trial court erred in considering the first affidavit without requiring the affidavit's production, given that the second affidavit showed that the parties entered into the contract at issue, which included the forum selection clause, the trial court properly considered the affidavit to that effect to support the advertiser's motion to dismiss on personal jurisdiction grounds. Consequently, when this second affidavit was not filed in violation of O.C.G.A. § 9-11-6(d), the trial court properly considered the second affidavit. *Alcatraz Me-*

dia, LLC v. Yahoo! Inc., 290 Ga. App. 882, 660 S.E.2d 797 (2008).

Discretion to consider affidavits not timely filed.

In a mandamus action wherein a principal sued a school superintendent seeking reinstatement to a former position, the trial court did not err by considering the principal's affidavit filed late in support of the principal's petition for mandamus, showing that the principal was earning less in an assignment as a math teacher because of a reduction in working hours, as it was within the trial court's discretion to consider opposing affidavits not served within statutory time limits. *Hall v. Nelson*, 282 Ga. 441, 651 S.E.2d 72 (2007).

2. Summary Judgment Proceedings

Service of affidavits with motion for summary judgment.

Trial court did not err in denying motions to strike the amended affidavits of a bank employee on the ground that the affidavits were not filed contemporaneously with the bank's motions for summary judgment because the trial court extended the time for filing the amended affidavits pursuant to O.C.G.A.

§ 9-11-6(d); the bank explained the bank's reasons for filing the amended affidavits. *Shropshire v. Alostair Bank of Commerce*, No. A11A1770; No. A11A1795; No. A11A1771, 2012 Ga. App. LEXIS 185 (Feb. 23, 2012).

Waiver for failure to object.

Failure of a maker and guarantors to obtain rulings on their motions to strike the amended affidavits of a bank employee on the ground that the affidavits were not filed contemporaneously with the bank's motions for summary judgment resulted in a waiver of appellate review of the issue. *Shropshire v. Alostair Bank of Commerce*, No. A11A1770; No. A11A1795; No. A11A1771, 2012 Ga. App. LEXIS 185 (Feb. 23, 2012).

Where timely response to motion filed, oral argument erroneously denied. — Because the responding party timely responded to a summary judgment motion, pursuant to Ga. Unif. Super. Ct. R. 6.3, given the appellate court's construction of both O.C.G.A. §§ 1-3-1 and 9-11-6, the trial court erred in denying that party oral argument on the motion and in granting summary judgment to the movant. *Green v. Raw Deal, Inc.*, 290 Ga. App. 464, 659 S.E.2d 856 (2008).

ARTICLE 3

PLEADINGS AND MOTIONS

RESEARCH REFERENCES

Am. Jur. Trials. — Litigating Construction Liens, 53 Am. Jur. Trials 367.

9-11-7. Pleadings allowed; form of motions.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
MOTIONS AND OTHER PAPERS

General Consideration

Cited in *Fox v. City of Cumming*, 289 Ga. App. 803, 658 S.E.2d 408 (2008); *Saye v. Deloitte & Touche, LLP*, 295 Ga. App. 128, 670 S.E.2d 818 (2008); *Chandler v. Opensided MRI of Atlanta, LLC*, 299 Ga.

App. 145, 682 S.E.2d 165 (2009), *aff'd*, 287 Ga. 406, 696 S.E.2d 640 (2010).

Motions and Other Papers

Demand for jury trial on damages issue. — Upon a review of the evidence

before the trial court, because neither of an individual's filed documents amounted to a "pleading" which placed damages in issue, neither document was in the nature of a formal answer, and neither actually disputed the amount of damages claimed, the trial court did not err in denying the individual a jury trial on the issue of damages; hence, the appeals court noted that to avoid doubt and confusion in the future, a defendant desiring a jury trial should file an answer specifically contesting damages and a demand for jury trial on the issue of damages, both clearly labeled as such. *Diaz v. Wills*, 286 Ga. App. 357, 649 S.E.2d 353 (2007).

Post-verdict oral request converted request for fees in counterclaim to motion. — In a civil suit involving the title of real property, a trial court erred by

denying the prevailing parties' oral post-verdict request for an award of attorney fees under O.C.G.A. § 9-15-14(a) as such oral request converted the original request made in a counterclaim to a motion, and the opposing party had the opportunity to be heard and argue against the award. *Nesbit v. Nesbit*, 295 Ga. App. 763, 673 S.E.2d 272 (2009).

Failure to move to dismiss in custody case. — Although defendants argued that the trial court in a custody case erred in failing to dismiss the action based on collateral estoppel, abatement, res judicata, and forum non conveniens, the record did not reflect that the defendants moved to dismiss the action based on these doctrines. *Wiepert v. Stover*, 298 Ga. App. 683, 680 S.E.2d 707 (2009).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 7C Counterclaim, Recoupment, and Setoff, § 3.

9-11-8. General rules of pleading.

Law reviews. — For annual survey of trial practice and procedure, see 58 *Merger L. Rev.* 405 (2006).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- PURPOSE AND CONSTRUCTION OF PLEADINGS
- FORM OF COMPLAINT
 - 1. IN GENERAL
- DEFENSES AND DENIALS, GENERALLY
- AFFIRMATIVE DEFENSES

General Consideration

Construction with other statutes. — In an action for damages, O.C.G.A. § 9-11-8(a)(2)(B), part of the Civil Practice Act (CPA), requires a written demand in the complaint for the damages requested; thus, if a court were to interpret O.C.G.A. § 44-14-3(c) as permitting a demand for liquidated damages to be made in the complaint, the section would have no real meaning because the CPA already

imposes such a requirement. Accordingly, if § 44-14-3(c) is to serve any real purpose, it must be construed as a requirement that a grantor make a written demand on the grantee for the liquidated damages as a condition precedent to creating the liability that serves as the basis for a lawsuit. *SunTrust Bank v. Hightower*, 291 Ga. App. 62, 660 S.E.2d 745 (2008).

O.C.G.A. § 9-10-112 is not "faulty" for conflicting with O.C.G.A.

§ 9-11-8(b). — Code Section 9-10-112, as the more specific statute, prevails over § 9-11-8(b). *Baylis v. Daryani*, 294 Ga. App. 729, 669 S.E.2d 674 (2008).

No judgment on pleadings based on answer only. — In an action to recover under a payment bond filed by a supplier, because the pleadings did not show that the supplier was unable to establish a defect in the notice of commencement, and a general contractor averred in its first affirmative defense that it had filed a notice of commencement with the Clerk of the Superior Court of Fulton County and had posted the notice of commencement at the project site, such an averment had to be considered to be denied by the supplier for purposes of a motion for judgment on the pleadings. *Consol. Pipe & Supply Co. v. Genoa Constr. Servs., Inc.*, 279 Ga. App. 894, 633 S.E.2d 59 (2006).

Cited in *Dudley v. Wachovia Bank, N.A.*, 290 Ga. App. 220, 659 S.E.2d 658 (2008); *Rooks v. Tenet Health Sys. GB, Inc.*, 292 Ga. App. 477, 664 S.E.2d 861 (2008); *Am. Teleconferencing Servs. v. Network Billing Sys., LLC*, 293 Ga. App. 772, 668 S.E.2d 259 (2008); *Neely v. City of Riverdale*, 298 Ga. App. 884, 681 S.E.2d 677 (2009); *LandSouth Constr., LLC v. Lake Shadow Ltd., LLC*, 303 Ga. App. 413, 693 S.E.2d 608 (2010); *Benedict v. State Farm Bank, FSB*, 309 Ga. App. 133, 709 S.E.2d 314 (2011); *Dillon v. Reid*, 312 Ga. App. 34, 717 S.E.2d 542 (2011).

Purpose and Construction of Pleadings

Purpose of pleadings to give notice.

Because a couple's complaint premised on an erroneous listing in a telephone directory failed to allege any of the claims they sought to pursue, specifically, interfering with their right of quiet enjoyment of their property and nuisance, and even after giving the couple the benefit of all reasonable inferences that could be drawn from their complaint, the fact remained that the directory's publisher was not placed on reasonable notice of whether the couple was asserting a claim in equity, contract, or tort, much less whether they were pleading a particular tort such as negligence or libel, the complaint was properly dismissed as failing to state a

claim upon which relief could be granted. *Patrick v. Verizon Directories Corp.*, 284 Ga. App. 123, 643 S.E.2d 251 (2007).

Shotgun pleading. — Trial court erred in granting the defendants' motions to dismiss the plaintiffs' complaint for failure to state a claim upon which relief could be granted and for judgment on the pleadings because the trial court should have required the plaintiffs to amend the plaintiffs' complaint and provide a more definite statement of the plaintiffs' claims before passing upon the motions; the amended complaint was a "shotgun pleading" because the complaint was not a short and plain statement of the claims that the plaintiffs asserted as required by the Civil Practice Act, O.C.G.A. § 9-11-8(a)(2)(A), the complaint did not give the defendants fair notice of the nature of the claims, and the complaint did not conform to several of the specific pleading requirements of the Act, specifically O.C.G.A. §§ 9-11-8, 9-11-9, and 9-11-10. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

Form of Complaint

1. In General

Short, plain statement giving defendant fair notice required.

Requiring the plaintiff to make a more definite statement of his or her claim saves judicial resources and permits the trial court, when a sufficiently more definite statement has been pled, to determine whether the complaint states a claim by applying the usual standards for the legal adequacy of a complaint; although the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, does not expressly authorize a court to order a more definite statement in the absence of a motion, O.C.G.A. § 9-11-12(e), there is no reason that a court cannot do so as an exercise of the court's inherent powers to manage the court's docket and to compel compliance with the rules and requirements of civil procedure. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

When a trial court orders a plaintiff to make a more definite statement of his or her claims, the court should identify the ways in which the complaint fails to con-

form to the pleading requirements of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, and the court also should warn the plaintiff about the potential consequences of a failure to replead in a way that conforms to these requirements; if the court still cannot ascertain the nature of the claims that the plaintiff seeks to assert, the court may enter another order to replead again, but the trial court and the defendants need not become caught in an endless cycle of attempts to replead, and if it appears that a plaintiff is unable or unwilling to plead in conformance to the Civil Practice Act and the directions of the court, the court may be authorized in some cases to dismiss the complaint under O.C.G.A. § 9-11-41(b), not for a failure to state a claim, but for disregard of the rules and orders of the court. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

Lack of claims by plaintiff in body of complaint was typographical error. — Since defendant contended that, although a non-diverse corporation was listed in the caption of the complaint, it had not in fact brought any claims against defendant because the body of the complaint referenced only the corporation's sole owner, the complaint did state claims for relief by the corporation, in light of the inclusion of the corporation in the caption, the explanation that the reference to the owner was a typographical error, the obvious intent of the plaintiffs to bring claims on behalf of the corporation, and the absence of prejudice to defendant. *Campbell v. Quixtar, Inc.*, No. 2:08-CV-0045-RWS, 2008 U.S. Dist. LEXIS 46507 (N.D. Ga. June 13, 2008).

Defenses and Denials, Generally

Answer to amended complaint not required.

Allegations of an amended complaint were deemed denied by operation of law, and because the holding in Division 1 of *Teamsters Local 515 v. Roadbuilders, Inc. of Tennessee*, 249 Ga. 418, 420, 291 S.E.2d 698 (Ga. 1982), and its progeny, e.g., *Wilson Welding Service v. Partee*, 234 Ga. App. 619, 620, 507 S.E.2d 168 (Ga. Ct. App. 1998), conflicted with that rule of law, they were overruled; a trial court

erred in holding that a defendant was required to answer an amended complaint to avoid a default and in defaulting a defendant upon a failure to answer an amended complaint. *Shields v. Gish*, 280 Ga. 556, 629 S.E.2d 244 (2006).

Defendant's denial of liability or indebtedness to seller satisfied O.C.G.A. § 15-10-43(c). — In magistrate court proceedings, the defendants were not required to specifically answer each allegation in a plaintiff's complaint, and the defendants were permitted from controverting liability through a general denial pursuant to O.C.G.A. § 9-11-8(b); thus, premitting whether the defendants' answer met the requirements for a general denial under the Civil Practice Act, the answer amounted to a sufficient response in the magistrate court, denying any liability or indebtedness to the plaintiff, and the trial court erred in finding otherwise. *Jones v. Equip. King Int'l*, 287 Ga. App. 867, 652 S.E.2d 811 (2007).

Affirmative Defenses

Payment, etc.

Insurance company argued that the trial court erred in considering the employer's affidavit and other evidence that the funds had already been paid, in that the employer had failed to raise the affirmative defense of payment in the employer's answer; however, there was certainly no surprise, as the insurance company at the hearing on the motions for summary judgment claimed that the company understood the employer was asserting payment as an affirmative defense. *Companion Prop. & Cas. Group v. Tutt Contr., Inc.*, 305 Ga. App. 879, 700 S.E.2d 708 (2010).

Failure of consideration, etc.

The trial court properly granted summary judgment to an attorney in the attorney's action to collect fees due under a written fee agreement with a former client as the attorney provided the services outlined within the contract, and the former client failed to produce any competent evidence supporting an affirmative defense of failure of consideration after the attorney made a prima facie case for summary judgment. *Browning v. Alan Mullinax & Assocs., P.C.*, 288 Ga. App. 43, 653 S.E.2d 786 (2007).

Statute of limitations, etc.

Buyer's response to a seller's summary judgment motion in which the buyer raised a statute of limitations defense was properly construed as a cross motion for summary judgment as: (1) pleadings were to be judged by their substance and a final judgment was to grant the relief to which the successful party was entitled, even if that party had not demanded such relief; (2) Georgia law authorized a trial court to grant summary judgment to a non-moving party, *sua sponte*; (3) the seller had ample notice of the statute of limitation defense, but did not respond to it or amend its pleadings; and (4) more than the 30-day statutory period passed before the summary judgment was granted. *All Tech Co. v. Laimer Unicon, LLC*, 281 Ga. App. 579, 636 S.E.2d 753 (2006).

Appellants were entitled to urge on appeal that appellees failed to show that certain legal bills fell outside the limitation period of O.C.G.A. § 9-3-31, even if they did not raise that specific factual argument in the trial court; the statute of limitations was an affirmative defense, and so the burden was on appellees to come forward with evidence sufficient to make out a *prima facie* case that appellants' billing claim fell outside the limitation period. *Falanga v. Kirschner & Venker, P.C.*, 286 Ga. App. 92, 648 S.E.2d 690 (2007).

In a medical malpractice action, be-

cause the undisputed evidence showed that both the personal injury claims and a later-added wrongful death claim were timely filed, both in terms of O.C.G.A. § 9-3-71 and the relevant statute of repose, the doctors sued were properly denied summary judgment as to those claims. *Cleaveland v. Gannon*, 288 Ga. App. 875, 655 S.E.2d 662 (2007), *aff'd*, 284 Ga. 376, 667 S.E.2d 366 (2008).

In a medical malpractice case, as the statute of limitations was an affirmative defense, the burden was on the doctors to establish as a matter of law that the patient's "new injury"—metastasized cancer which the doctors failed to diagnose—occurred and manifested itself more than two years before the suit was filed and that the suit was thus time-barred under O.C.G.A. § 9-3-71(a). As the doctors failed to meet that burden, the doctors were not entitled to summary judgment. *Cleaveland v. Gannon*, 284 Ga. 376, 667 S.E.2d 366 (2008).

Waiver.

Although a dispossessory action was improperly transferred to superior court because a default judgment stood as a final order, appellants, against whom a third-party suit was filed after the transfer, had not challenged the propriety of the transfer in superior court and thus under O.C.G.A. § 9-11-8 had waived their argument that it was improper. *Abushmais v. Erby*, 282 Ga. 619, 652 S.E.2d 549 (2007).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 1 Am. Jur. Pleading and Practice Forms, Accord and Satisfaction, § 8. 8C Am. Jur. Pleading and Practice Forms, Duress and Undue Influence, § 1. 9A Am.

Jur. Pleading and Practice Forms, Estoppel and Waiver, § 5. 19B Am. Jur. Pleading and Practice Forms, Pleading, §§ 62, 73.

9-11-9. Pleading special matters.

Law reviews. — For survey article on law of torts, see 59 Mercer L. Rev. 397 (2007).

JUDICIAL DECISIONS**ANALYSIS****GENERAL CONSIDERATION****FRAUD, MISTAKE, AND MENTAL CONDITION**

SPECIAL DAMAGES

General Consideration**Proper remedy for seeking more particularity, etc.**

Trial court erred in granting the defendants' motions to dismiss the plaintiffs' complaint for failure to state a claim upon which relief could be granted and for judgment on the pleadings because the trial court should have required the plaintiffs to amend the plaintiffs' complaint and provide a more definite statement of the plaintiffs' claims before passing upon the motions; the amended complaint was a "shotgun pleading" because the complaint was not a short and plain statement of the claims that the plaintiffs asserted as required by the Civil Practice Act, O.C.G.A. § 9-11-8(a)(2)(A), the complaint did not give the defendants fair notice of the nature of the claims, and the complaint did not conform to several of the specific pleading requirements of the Act, specifically O.C.G.A. §§ 9-11-8, 9-11-9, and 9-11-10. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

When a trial court orders a plaintiff to make a more definite statement of his or her claims, the court should identify the ways in which the complaint fails to conform to the pleading requirements of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, and the court also should warn the plaintiff about the potential consequences of a failure to replead in a way that conforms to these requirements; if the court still cannot ascertain the nature of the claims that the plaintiff seeks to assert, the court may enter another order to replead again, but the trial court and the defendants need not become caught in an endless cycle of attempts to replead, and if it appears that a plaintiff is unable or unwilling to plead in conformance to the Civil Practice Act and the directions of the court, the court may be authorized in some cases to dismiss the complaint under O.C.G.A. § 9-11-41(b), not for a failure to state a claim, but for disregard of the rules and orders of the court. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

Cited in *Rooks v. Tenet Health Sys. GB, Inc.*, 292 Ga. App. 477, 664 S.E.2d 861

(2008); *Weatherly v. Weatherly*, 292 Ga. App. 879, 665 S.E.2d 922 (2008); *Memar v. Styblo*, 293 Ga. App. 528, 667 S.E.2d 388 (2008); *Walker v. Walker*, 293 Ga. App. 872, 668 S.E.2d 330 (2008).

Fraud, Mistake, and Mental Condition

Reasonable reliance sufficiently pleaded. — In claiming fraud and negligent misrepresentation, a shareholder did not fail to allege facts showing reasonable reliance as required by O.C.G.A. § 9-11-9(b); the amended complaint alleged that the shareholder detrimentally relied upon misrepresentations allegedly made in a press release, "as any similarly situated shareholder and investor would reasonably rely on similar press releases," and thus it could not be said that the shareholder was bound to fail to establish reasonable reliance. *Hedquist v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 284 Ga. App. 387, 643 S.E.2d 864 (2007).

Reliance not shown. — Plaintiff alleged that an attorney's statements induced the attorney's client to breach the contract; plaintiff does not contend that plaintiff personally relied on any misrepresentations by the attorney, who was the defendant. Thus, because plaintiff's pleading shows on the pleading's face that the plaintiff was not damaged as a result of plaintiff's own reliance on any false misrepresentation made by the attorney, plaintiff's fraud claim failed and was properly dismissed. *Fortson v. Hotard*, 299 Ga. App. 800, 684 S.E.2d 18 (2009).

Circumstances constituting fraud must be stated with particularity.

The face of a complaint failed to allege any specific facts to support a finding that an engineer intentionally made false statements about the condition of a retaining wall on the plaintiff's property when the engineer sent an inspection letter to a builder, that the engineer sent the letter to the builder with the intention of inducing the plaintiff, a third party, to rely on the letter or that the plaintiff justifiably relied on the letter; as a result, the plaintiff's complaint was legally insufficient to present a fraud claim. *Dockens v.*

Runkle Consulting, Inc., 285 Ga. App. 896, 648 S.E.2d 80 (2007), cert. denied, 2007 Ga. LEXIS 668 (2007).

In a suit brought by a golf course development company against two other members of a limited liability company and a housing authority, the trial court erred by dismissing one of the member's counterclaim asserting fraud as that member pled in detail numerous instances of false representations by the golf course development company that, when taken as true for purposes of the motion to dismiss, supported a claim of fraud. *Perry Golf Course Dev., LLC v. Hous. Auth.*, 294 Ga. App. 387, 670 S.E.2d 171 (2008).

Allegations of fraud must be specific and factual, etc.

Student's allegations of fraud and perjury contained in a one sentence complaint were insufficient and the student did not carry the burden simply by making assertions in an appellate brief. *Majeed v. Randall*, 279 Ga. App. 679, 632 S.E.2d 413 (2006).

Homeowner failed to state a claim for fraud by overbilling by a lender, which resulted in the wrongful foreclosure of the homeowner's home by a law firm, because the homeowner did not allege fraud with particularity as required by O.C.G.A. § 9-11-9(b). The homeowner failed to state a claim under the Fair Credit Billing Act because it applied solely to creditors of open end credit plans pursuant to 15 U.S.C. § 1602. *Fairfax v. Wells Fargo Bank, N. A.*, 312 Ga. App. 171, 718 S.E.2d 16 (2011).

While a client's complaint contained a count for fraud, the client failed to allege any specific facts to state a cause of action for fraud pursuant to O.C.G.A. §§ 9-11-9, 51-6-1, and 51-6-2(b) because the complaint failed to allege any specific facts indicating that a former attorney intentionally made false statements to the client during the course of the representation of the client. *Fortson v. Freeman*, 313 Ga. App. 326, 721 S.E.2d 607 (2011).

Remedy for failure to plead fraud with particularity, etc.

Appellants' alleged failure to plead fraud with specificity did not warrant a grant of summary judgment when appellees had not filed a motion for a more

definite statement in the trial court. *Falanga v. Kirschner & Venker, P.C.*, 286 Ga. App. 92, 648 S.E.2d 690 (2007).

Motion to dismiss fraud claim properly denied. — In a medical negligence, wrongful death, and fraud action, a trial court properly denied a hospital's motion to dismiss the fraud claim against it and allowed the suing spouse to amend the complaint to include the specificity for a fraud claim required by O.C.G.A. § 9-11-9 as sufficient allegations were made that the hospital concealed certain events leading to the death of the decedent/patient and that hospital employees intentionally made false statements about the decedent's condition with the intention of inducing the spouse to rely on them or that the spouse justifiably relied on the alleged false statements, which involved the improper placement of a feeding tube into the lung of the decedent/patient. *Roberts v. Nessim*, 297 Ga. App. 278, 676 S.E.2d 734 (2009).

Although a complaint alleging that hospital employees attempted to conceal the events leading to the decedent's death failed to allege specific facts to support a finding that the hospital intentionally made false statements about the decedent's condition with the intention of inducing the decedent's spouse to rely on them, or that the spouse justifiably relied on the alleged false statements, as it did not appear beyond doubt that the spouse could prove no set of facts in support of the fraud claim that would entitle the spouse to relief and therefor the hospital was not entitled to have the fraud claim dismissed. *Roberts v. Nessim*, 297 Ga. App. 278, 676 S.E.2d 734 (2009).

Special Damages

Special damages to be pleaded with particularity.

Since the appellee did not include in an amended complaint a plea for special damages under O.C.G.A. § 9-11-9(g), the defamation count of the amended complaint was limited to a claim alleging slander per se; employment of the Milkovich factors determined only that the alleged opinion was actionable as slander, but the Milkovich factors had no bearing on whether the words used con-

stituted slander per se; statements which could have been interpreted as having the purpose of injuring the appellee's business by stating or implying that the appellee was going out of the real estate development business in which the appellee was

still engaged and leaving the area, were not recognizable as injurious on their face, and the appellant was entitled to summary judgment on the appellee's slander per se claim. *Bellemeade, LLC v. Stoker*, 280 Ga. 635, 631 S.E.2d 693 (2006).

9-11-9.1. Affidavit to accompany charge of professional malpractice.

(a) In any action for damages alleging professional malpractice against:

(1) A professional licensed by the State of Georgia and listed in subsection (g) of this Code section;

(2) A domestic or foreign partnership, corporation, professional corporation, business trust, general partnership, limited partnership, limited liability company, limited liability partnership, association, or any other legal entity alleged to be liable based upon the action or inaction of a professional licensed by the State of Georgia and listed in subsection (g) of this Code section; or

(3) Any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (g) of this Code section,

the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

(b) The contemporaneous affidavit filing requirement pursuant to subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire or there is a good faith basis to believe it will expire on any claim stated in the complaint within ten days of the date of filing the complaint and, because of time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, if the attorney for the plaintiff files with the complaint an affidavit in which the attorney swears or affirms that his or her law firm was not retained by the plaintiff more than 90 days prior to the expiration of the period of limitation on the plaintiff's claim or claims, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court shall not extend such time for any reason without consent of all parties. If either affidavit is not filed within the periods specified in this Code section, or it is determined that the law firm of the attorney who filed the affidavit permitted in lieu of the contemporaneous filing of an expert affidavit or any attorney who appears on the pleadings was retained by the plaintiff

more than 90 days prior to the expiration of the period of limitation, the complaint shall be dismissed for failure to state a claim.

(c) This Code section shall not be construed to extend any applicable period of limitation, except that if the affidavits are filed within the periods specified in this Code section, the filing of the affidavit of an expert after the expiration of the period of limitations shall be considered timely and shall provide no basis for a statute of limitations defense.

(d) If a complaint alleging professional malpractice is filed without the contemporaneous filing of an affidavit as permitted by subsection (b) of this Code section, the defendant shall not be required to file an answer to the complaint until 30 days after the filing of the affidavit of an expert, and no discovery shall take place until after the filing of the answer.

(e) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that said affidavit is defective, the plaintiff's complaint shall be subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9-11-15 within 30 days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing said amendment or response to the motion, or both, as it shall determine justice requires.

(f) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit within the time required by this Code section and the failure to file the affidavit was the result of a mistake.

(g) The professions to which this Code section shall apply are:

- (1) Architects;
- (2) Attorneys at law;
- (3) Audiologists;
- (4) Certified public accountants;
- (5) Chiropractors;
- (6) Clinical social workers;
- (7) Dentists;

- (8) Dietitians;
- (9) Land surveyors;
- (10) Marriage and family therapists;
- (11) Medical doctors;
- (12) Nurses;
- (13) Occupational therapists;
- (14) Optometrists;
- (15) Osteopathic physicians;
- (16) Pharmacists;
- (17) Physical therapists;
- (18) Physicians' assistants;
- (19) Podiatrists;
- (20) Professional counselors;
- (21) Professional engineers;
- (22) Psychologists;
- (23) Radiological technicians;
- (24) Respiratory therapists;
- (25) Speech-language pathologists; or
- (26) Veterinarians. (Code 1981, § 9-11-9.1, enacted by Ga. L. 1987, p. 887, § 3; Ga. L. 1989, p. 419, § 3; Ga. L. 1997, p. 916, § 1; Ga. L. 2005, p. 1, § 3/SB 3; Ga. L. 2006, p. 72, § 9/SB 465; Ga. L. 2007, p. 216, § 1/HB 221.)

The 2007 amendment, effective July 1, 2007, rewrote subsection (a); added subsections (b) through (d); redesignated former subsections (b) through (d) as present subsections (e) through (g), respectively; substituted "shall be" for "is" in the middle of the first sentence of subsection (e); and substituted "shall apply" for "applies" in present subsection (g). See Editor's note for applicability.

Editor's notes. — Ga. L. 2007, p. 216, § 3, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2007, and shall apply to any action filed on or after July 1, 2007."

Law reviews. — For article on 2005 amendment of this section, see 22 Ga. St.

U.L. Rev. 221 (2005). For article, "Georgia's New Expert Witness Rule: Daubert and More," see 11 Ga. St. B.J. 16 (2005). For annual survey of construction law, see 57 Mercer L. Rev. 79 (2005). For annual survey of legal ethics decisions, see 57 Mercer L. Rev. 273 (2005). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For annual survey of evidence law, see 58 Mercer L. Rev. 151 (2006). For survey article on evidence law, see 59 Mercer L. Rev. 157 (2007). For survey article on legal ethics, see 59 Mercer L. Rev. 253 (2007). For survey article on law of torts, see 59 Mercer L. Rev. 397 (2007). For survey article on trial practice and procedure, see

59 Mercer L. Rev. 423 (2007). For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008). For annual survey on evidence, see 61 Mercer L. Rev. 135 (2009). For annual survey on trial practice

and procedure, see 61 Mercer L. Rev. 363 (2009). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

JUDICIAL DECISIONS

Constitutionality.

Because nothing in O.C.G.A. § 9-11-9.1 imposed a cost or fee for filing or obtaining an expert affidavit, and because the law applied uniformly to any person or entity bringing a lawsuit for professional negligence, the trial court did not err when the court ruled that the statute withstood the constitutional challenges raised by the clients. *Walker v. Cromartie*, 287 Ga. 511, 696 S.E.2d 654 (2010).

Section applied retroactively.

In a wrongful death action, because the 45-day grace period under former O.C.G.A. § 9-11-9.1(b) (now (e)) was constitutionally required, an administratrix was entitled to the benefit of its provisions and retroactive application. *Rockdale Health Sys. v. Holder*, 280 Ga. App. 298, 640 S.E.2d 52 (2006).

Grace period eliminated. — Current version of O.C.G.A. § 9-11-9.1 eliminated the 45-day grace period for filing an expert affidavit as well as the possibility of additional extensions for “good cause” shown; a patient was not entitled to obtain additional time to file an expert affidavit in a malpractice case filed after the effective date of the current version of O.C.G.A. § 9-11-9.1. *Scott v. Martin*, 280 Ga. App. 311, 633 S.E.2d 665 (2006).

De facto notary doctrine. — Pursuant to the de facto notary doctrine, an expert’s affidavit satisfied the requirements of O.C.G.A. § 9-11-9.1, despite the fact that the commission of the notary who attested the affidavit had expired. *Thomas v. Gastroenterology Assocs. of Gainesville, P.C.*, 280 Ga. 698, 632 S.E.2d 118 (2006).

“Professional.”

Affidavit requirement of O.C.G.A. § 9-11-9.1 did not apply to any acts committed by a lab technician because the technician was not recognized as a “professional” under Georgia law, O.C.G.A. § 14-7-2. *Pattman v. Mann*, 307 Ga. App. 413, 701 S.E.2d 232 (2010).

Section applies to professional malpractice action.

While the trial court erred in granting summary judgment against a patient in a medical malpractice action based on a failure to attach an expert affidavit pursuant to O.C.G.A. § 9-11-9.1 because the complaint could be construed as alleging claims of ordinary negligence, to the extent the complaint could be read to allege professional malpractice claims, summary judgment was proper; moreover, there were instances in which actions performed by a professional were nevertheless not professional acts constituting professional malpractice, but, rather, were acts of simple negligence which would not require proof by expert evidence. *Brown v. Tift County Hosp. Auth.*, 280 Ga. App. 847, 635 S.E.2d 184 (2006).

State court properly denied a clinic’s motion to dismiss a negligence complaint which arose out of injuries a patient allegedly sustained by and through the negligence of one of the clinic’s employees, as the patient was not suing for medical malpractice, the employee was not a licensed health care provider, and thus the patient was not required to file the necessary affidavit required under O.C.G.A. § 9-11-9.1. *Mt. Orthopedics & Sports Med., P.C. v. Williams*, 284 Ga. App. 885, 644 S.E.2d 868 (2007).

Former federal inmate’s argument, alleging that the Bivens decision should be extended to the inmate’s Eighth Amendment claim against private prison employees because the affidavit requirement of O.C.G.A. § 9-11-9.1(a) made recovery only theoretical under state law, failed; not only did the complaint not allege a claim for medical malpractice as defined by O.C.G.A. § 9-3-70, but even if the complaint did the inmate stood in the same shoes as anyone else in Georgia filing a professional malpractice claim and was subject to no stricter rules than the rest of

Georgia's residents. *Alba v. Montford*, 517 F.3d 1249 (11th Cir. 2008), cert. denied, 129 S. Ct. 632, 172 L.Ed.2d 619 (2008).

Impact rule does not apply to medical malpractice actions. — Policy concerns traditionally given for the impact rule and denying recovery for emotional distress unrelated to physical injuries are not present in medical malpractice cases because such cases require a physician-patient relationship between the defendant and the plaintiff; consequently, there is no question regarding the emotional impact of the defendant's alleged negligence on third parties or bystanders, nor is there concern about a "flood of litigation" arising from such negligence, and the concern about avoiding fraudulent or frivolous lawsuits is already addressed by the strict pleading requirements of O.C.G.A. § 9-11-9.1, the purpose of which is to reduce the number of frivolous malpractice suits filed. *Bruscato v. O'Brien*, 307 Ga. App. 452, 705 S.E.2d 275 (2010).

Professional malpractice or ordinary negligence.

Dismissal of an action filed by children against a health care center that operated a nursing home alleging that their parent's injuries in a fall resulted from the nursing home's failure to follow emergency room instructions to take fall precautions was proper because the children did not file an expert affidavit contemporaneously with the complaint as required by O.C.G.A. § 9-11-9.1(a); their claim sounded in professional negligence, not ordinary negligence, because the nursing home was not given a list of specific precautions to be implemented, and the decision as to what specific precautions to take was left to the medical judgment of its staff. *Gaddis v. Chatsworth Health Care Ctr., Inc.*, 282 Ga. App. 615, 639 S.E.2d 399 (2006).

Trial court did not abuse its discretion in vacating its initial order dismissing an administratrix's wrongful death complaint for failure to timely file an expert's affidavit, as the record revealed that the original complaint, although not styled as a wrongful death action, nonetheless pled that a hospital's negligence caused the decedent's death and sought a judgment

against it in an amount in excess of \$10,000 for all damages recoverable by law. *Rockdale Health Sys. v. Holder*, 280 Ga. App. 298, 640 S.E.2d 52 (2006).

Because a patient's complaint was so general and unspecific that the complaint could be construed to allege that a medical center was vicariously liable for the professional negligence of a licensed health care professional, as opposed to ordinary negligence, the patient was required to file an expert affidavit under O.C.G.A. § 9-11-9.1. *Health Mgmt. Assocs. v. Bazemore*, 286 Ga. App. 285, 648 S.E.2d 749 (2007).

A patient's complaint that a hospital nurse had administered the wrong medication sounded in professional negligence, not ordinary negligence; thus, an affidavit was required under O.C.G.A. § 9-11-9.1(a). *Wellstar Health Sys. v. Painter*, 288 Ga. App. 659, 655 S.E.2d 251 (2007).

Trial court did not err in granting summary judgment in favor of a hospital and the hospital's employees in a surviving spouse's wrongful death action on the ground that the spouse's claims sounded in professional negligence, not ordinary negligence, which required an affidavit under O.C.G.A. § 9-11-9.1 because whether or not the treatments ordered by the husband's treating physician and carried out by the employees were timely, was a question of medical judgment, and the duties involved in the administration of medications and treatments constituted a professional service; the spouse pointed to no admissible medical testimony to support the spouse's claim that the failure of the lab technician to call the intensive care unit (ICU) when the blood arrived caused the decedent's death, and the question of whether or not the lab technician's failure to call the ICU, resulting in the failure of the ICU to administer a blood transfusion, caused the decedent's death required expert testimony, which was excluded from the case. *Pattman v. Mann*, 307 Ga. App. 413, 701 S.E.2d 232 (2010).

Because a patient's complaint did not allege any negligence in the administration of a vaccination, but rather that a medical assistant was negligent in attempting to prevent the patient's fall from

an examination table, there was no need for an expert affidavit under O.C.G.A. § 9-11-9.1(a); therefore, the trial court erred in dismissing the action. *Kerr v. OB/GYN Assocs.*, 314 Ga. App. 40, 723 S.E.2d 302 (2012).

Competence of affiant.

In a medical malpractice action, given the relevant past experience of the patient's expert as a nurse, and the expert's familiarity with the degree and skills required of nurses and other medical staff in giving intermuscular injections, the expert was sufficiently qualified to render an expert opinion in the case. *Allen v. Family Med. Ctr., P.C.*, 287 Ga. App. 522, 652 S.E.2d 173 (2007).

The trial court did not abuse its discretion by dismissing the parents' medical malpractice action because the court correctly found that the purported expert offered by the parents failed to make even one diagnosis of a vascular ring within five years of the date at issue, and had not taught others for at least three of the last five years to diagnose a vascular ring. *Spacht v. Troyer*, 288 Ga. App. 898, 655 S.E.2d 656 (2007), cert. denied, 129 S. Ct. 726, 172 L.Ed.2d 726 (2008).

Affidavit requirement inapplicable to ordinary negligence claim.

Trial judge did not err in denying a motion to dismiss a damages complaint filed against two medical clinics on grounds that the suing party failed to attach an expert affidavit as required by O.C.G.A. § 9-11-9.1(a), as the appeals court agreed that it was unclear from the face of the complaint whether the suing party was alleging either professional or simple negligence; hence, it was entitled to pursue a simple negligence claim without an expert affidavit. *Atlanta Women's Health Group, P.C. v. Clemons*, 287 Ga. App. 426, 651 S.E.2d 762 (2007).

Affidavit requirement inapplicable to claim for wrongful death. — A trial court properly refused to dismiss a plaintiff's claim asserting tortious termination of life support based on the defendant's argument that it was really a medical malpractice claim and, therefore, required an expert medical affidavit under O.C.G.A. § 9-11-9.1; because such a claim is a suit for wrongful death, not medical

malpractice, no expert medical affidavit was necessary. *DeKalb Med. Ctr., Inc. v. Hawkins*, 288 Ga. App. 840, 655 S.E.2d 823 (2007), cert. denied, 2008 Ga. LEXIS 477 (Ga. 2008).

Affidavit requirement inapplicable to intentional tort claim. — The trial court erroneously dismissed a couple's complaint upon grounds that the complaint failed to state a claim upon which relief could be granted because the complaint alleged intentional torts against an attorney and that attorney's law firm, and not claims of professional malpractice or negligence; therefore, the complaint was not required to be accompanied by an expert's affidavit pursuant to O.C.G.A. § 9-11-9.1. *Walker v. Wallis*, 289 Ga. App. 676, 658 S.E.2d 217 (2008).

Affidavit requirement inapplicable in bankruptcy court. — Chapter 13 debtors' adversary proceeding for legal malpractice, filed in a bankruptcy court, did not require an affidavit concerning the standard of care under O.C.G.A. § 9-11-9.1 because the federal rules of pleading applied to the proceeding. *Pullen v. Cornelison* (In re Pullen), No. 07-65415-MHM, 2009 Bankr. LEXIS 817 (Bankr. N.D. Ga. Mar. 31, 2009).

Engineers. — Statute applies to professional engineers that are licensed by the State of Georgia. *Goolsby v. Gain Techs., Inc.*, No. 08-16587, 2010 U.S. App. LEXIS 1380 (11th Cir. Jan. 21, 2010) (Unpublished).

Engineering profession.

A trial court properly granted summary judgment to a defendant engineer on a plaintiff's professional negligence claim pursuant to O.C.G.A. § 9-11-9.1 since the plaintiff's complaint showed on its face that the complaint involved an allegation of professional negligence that required an expert affidavit under § 9-11-9.1(a) and (d)(21), and the plaintiff failed to file such an affidavit with the complaint; the plaintiff's pro se status did not exempt the plaintiff from complying with the affidavit requirement of § 9-11-9.1. *Dockens v. Runkle Consulting, Inc.*, 285 Ga. App. 896, 648 S.E.2d 80 (2007), cert. denied, 2007 Ga. LEXIS 668 (2007).

When affidavit required.

Since no affidavit was filed pursuant to

O.C.G.A. § 9-11-9.1, an administrator of an estate was allowed to maintain claims against a nursing care facility only with regard to actions or omissions in executing nonprofessional work duties relating to the decedent's fall at the facility, and was not allowed to maintain claims based on medical questions concerning specialized expert knowledge; the alleged failure to adequately monitor for injuries and assure proper medical care fell within the realm of professional medical decision making, but the allegation that the fall was not properly documented encompassed an administrative task not involving professional medical judgment. *Brown v. Tift Health Care, Inc.*, 279 Ga. App. 164, 630 S.E.2d 788 (2006).

Trial court erred in dismissing a client's amended legal malpractice complaint, which included fraud and breach of fiduciary duty, as the client's failure to file an expert affidavit pursuant to O.C.G.A. § 9-11-9.1 did not result in an automatic adjudication on the merits or preclude said amendment after the expiration of the relevant statute of limitation; further, the appeals court disagreed that the client's fraud and breach of fiduciary duty claims were barred because they arose from the same factual allegations, as the original claim for professional negligence, and because the fraud claim was grounded in intentional conduct, it did not need to be accompanied by an expert affidavit. *Shuler v. Hicks, Massey & Gardner, LLP*, 280 Ga. App. 738, 634 S.E.2d 786 (2006).

Trial court properly dismissed a wrongful death claim by a deceased nursing home resident's children, alleging that the nursing home staff failed to properly administer the resident's medications, as such task involved the professional skill and judgment of a nurse, and nurses were licensed professionals with specialized knowledge pursuant to O.C.G.A. § 43-26-3(6) to which O.C.G.A. § 9-11-9.1 explicitly applied; as the children failed to comply with the expert affidavit requirement, dismissal of that aspect of the claim was proper. *Williams v. Alvista Healthcare Ctr., Inc.*, 283 Ga. App. 613, 642 S.E.2d 232 (2007).

A hospital's admission that a nurse had

given a patient the wrong medication did not relieve the patient of the obligation to file an affidavit under O.C.G.A. § 9-11-9.1. *Wellstar Health Sys. v. Painter*, 288 Ga. App. 659, 655 S.E.2d 251 (2007).

Denial of practice groups' motion to dismiss parents' medical malpractice action based on the parents' failure to comply with the expert affidavit requirement of former O.C.G.A. § 9-11-9.1 was error because a prior appellate decision concluded that, at the time the litigation was brought, the question of whether a plaintiff was subject to the expert affidavit requirement depended not on the identity of the defendant, but on the cause of action, and explicitly held that, without an expert affidavit, the parents could have sustained only an ordinary negligence claim; the trial court's ruling, which held that because the practice groups were not licensed professionals or licensed health care facilities, no expert affidavit was needed, violated the law of the case. The parents could not have successfully argued on the appeal that the parents malpractice claims were exempt from the expert affidavit requirement. *Atlanta Women's Health Group, P.C. v. Clemons*, 299 Ga. App. 102, 681 S.E.2d 754 (2009).

Trial court properly dismissed a title company's complaint against an attorney for failure to comply with the expert affidavit requirement of O.C.G.A. § 9-11-9.1 because the complaint set forth a legal malpractice action by asserting that the attorney breached a legal services agreement to provide an accurate title commitment on certain real property, therefore, the complaint required compliance with the expert affidavit requirement of § 9-11-9.1. *Old Republic Nat'l Title Ins. Co. v. Atty. Title Servs.*, 299 Ga. App. 6, 682 S.E.2d 134 (2009), cert. denied, No. S09C1913, 2009 Ga. LEXIS 798 (Ga. 2009).

A trial court correctly determined that a plaintiff's failure-to-warn claim against the state, arising out of the prescription of medicine for the plaintiff while the plaintiff was in a state-run hospital, alleged professional negligence and that the plaintiff's failure to comply with the affidavit requirements of O.C.G.A.

§ 9-11-9.1(a) warranted dismissal of the complaint. *Nail v. State*, 301 Ga. App. 7, 686 S.E.2d 483 (2009).

When affidavit not required.

O.C.G.A. § 9-11-9.1 did not require a patient to file an expert affidavit with a complaint for fraud, misrepresentation, and deceit against a physician because the patient's allegations that the physician knowingly and intentionally misrepresented the nature and quality of a local hospital's equipment in order to induce the patient to have heart surgery at the local hospital rather than at another hospital preferred by the patient involved no question of professional judgment; the application of O.C.G.A. § 9-11-9.1 was limited to actions for professional negligence, and assertions of intentional misconduct against a professional fell outside of its scope. *Murrah v. Fender*, 282 Ga. App. 634, 639 S.E.2d 595 (2006).

Trial court erred in dismissing a wrongful death claim by children of a deceased nursing home resident, based on their allegation that the nursing home violated O.C.G.A. § 31-8-108(a)(2) of the Bill of Rights for Residents of Long-Term Care Facilities by not documenting the resident's complaints of chest pain, as the claim was based on the nonprofessional, administrative aspects of running the facility and accordingly, it was not subject to the pleading requirement of an expert affidavit pursuant to O.C.G.A. § 9-11-9.1. *Williams v. Alvista Healthcare Ctr., Inc.*, 283 Ga. App. 613, 642 S.E.2d 232 (2007).

A couple who alleged that an engineer exceeded the authority granted in a stipulation for the engineer to remove pieces of a car for testing was not alleging professional malpractice and thus was not required to file an affidavit under O.C.G.A. § 9-11-9.1; resolution of the couple's claims required determination of whether the engineer complied with the language of the stipulation, not determination of whether the engineer acted in compliance with the standard of conduct applicable to professional engineers. *Burke v. Paul*, 289 Ga. App. 826, 658 S.E.2d 430 (2008).

Failure to file expert affidavit.

Motion to dismiss for failure to file an expert affidavit under O.C.G.A. § 9-11-9.1

had to be considered as a motion to dismiss for failure to state a claim under O.C.G.A. § 9-11-12(b)(6). *Burke v. Paul*, 289 Ga. App. 826, 658 S.E.2d 430 (2008).

In a parent's wrongful death suit against a doctor, the trial court erred by partially denying the doctor's motion to dismiss all the claims as the allegations in the complaint alleged professional negligence by asserting inappropriate multiple pain medication prescriptions, which were claims that required the filing of an expert affidavit under O.C.G.A. § 9-11-9.1(a). Since the parent failed to file such an affidavit, the doctor's motion to dismiss should have been granted in the motion's entirety. *Liu v. Boyd*, 294 Ga. App. 224, 668 S.E.2d 843 (2008).

Plaintiff failed to file an expert affidavit to support plaintiff's claim for professional malpractice; accordingly, the trial court did not err in granting defendant's motion to dismiss plaintiff's professional malpractice claim. *Fortson v. Hotard*, 299 Ga. App. 800, 684 S.E.2d 18 (2009).

Trial court did not err in dismissing with prejudice a plaintiff's medical malpractice action on the ground that the plaintiff failed to attach the required affidavits under O.C.G.A. § 9-11-9.1, and, although the plaintiff argued that the trial court should have allowed the plaintiff to amend the complaint to attach the affidavits or at least should have only dismissed the complaint as without prejudice so that the plaintiff could refile under the renewal statute, O.C.G.A. §§ 9-2-61(a) and 9-11-9.1 did not allow such amendments; dismissals for failure to attach such affidavits were dismissals for failure to state a claim and were, therefore, on the merits and with prejudice. *Roberson v. Northrup*, 302 Ga. App. 405, 691 S.E.2d 547 (2010).

Because the un rebutted evidence showed that an officer's claims sounded in professional negligence, rather than ordinary negligence, and the officer failed to file contemporaneously with the complaint the expert affidavit required by O.C.G.A. § 9-11-9.1(a), there was no error in the trial court's grant of a corporation's motion to dismiss. *Odion v. Varon*, 312 Ga. App. 242, 718 S.E.2d 23 (2011).

Trial court did not err in dismissing a

client's action against a former attorney and a law firm for the client's failure to file an expert affidavit pursuant to O.C.G.A. § 9-11-9.1(a) because the client's claims asserted legal malpractice, and the client was required to comply with the provisions of O.C.G.A. § 9-11-9.1; although the client's complaint purported to state various causes of action, the substance of the allegations raised only claims of professional negligence against the attorney and law firm since all of the allegations in the complaint concerned the attorney's legal advice and actions taken as the client's legal representative in the underlying lawsuit. *Fortson v. Freeman*, 313 Ga. App. 326, 721 S.E.2d 607 (2011).

Failure to file expert affidavit may not be fatal. — Cases that hold that the failure to file an expert affidavit with the complaint renders the complaint void and not subject to renewal should be overruled on that point, namely, *Foskey v. Foster*, 199 Ga. App. 205 (404 SE2d 303) (1991); *Lyberger v. Robinson*, 207 Ga. App. 845 (429 SE2d 324) (1993); *Trucano v. Rosenberg*, 215 Ga. App. 153 (450 SE2d 216) (1994); *Grier-Baxter v. Sibley*, 247 Ga. App. 560 (545 SE2d 5) (2001); *Witherspoon v. Aranas*, 254 Ga. App. 609 (562 SE2d 853) (2002); *Shirley v. Hospital Auth. of Valdosta/Lowndes County*, 263 Ga. App. 408 (587 SE2d 873) (2003); and *Winfrey v. Total Health Clinic Corp.*, 255 Ga. App. 617 (566 SE2d 372) (2002). *Chandler v. Opensided MRI of Atlanta, LLC*, 299 Ga. App. 145, 682 S.E.2d 165 (2009), *aff'd*, 287 Ga. 406, 696 S.E.2d 640 (2010).

New complaint, read in the son and the administrator's favor, adequately pled fraud, battery, conspiracy, and wrongful death against the doctors, the nurses, and the hospital as the complaint asserted that the doctor knowingly and falsely represented to the family that the deceased's comatose condition was the result of metastasized cancer rather than aspiration, and that the doctor's intention in doing so was to deceive the family as to its actual cause. The complaint also asserted that the second doctor and the nurses were complicit in the doctor's misrepresentations and assisted the doctor in the deception of the family; that the family relied on

the misrepresentations when the family agreed to admit the deceased to hospice care; and that as a proximate result of being admitted to hospice, the deceased was denied food and water and suffered renal failure. Therefore, because the son and the administrator were not required to support their adequately pled claims for fraud, battery, and conspiracy with a O.C.G.A. § 9-11-9.1 affidavit, the trial court erred when the court granted the motion to dismiss the claims. *Estate of Shannon v. Ahmed*, 304 Ga. App. 380, 696 S.E.2d 408 (2010).

Failure to attach records. — In a medical malpractice action, because it was undisputed that the record on appeal failed to include the medical records on which the parents' expert's conclusions were based, the parents failed to comply with O.C.G.A. § 9-11-56(e), hence, the trial court did not err when it granted summary judgment against them on this basis. *Conley v. Children's Healthcare of Atlanta, Inc.*, 279 Ga. App. 792, 632 S.E.2d 409 (2006).

Compliance with statute not addressed in reversal of summary judgment order. — In a medical malpractice action, because the record on appeal contained evidence creating a genuine issue of material fact as to the proximate cause of a patient's injuries, the trial court erred in granting a hospital summary judgment; moreover, the appeals court declined to hear the hospital's claim that the patient failed to comply with O.C.G.A. § 9-11-9.1. *Renz v. Northside Hosp., Inc.*, 285 Ga. App. 882, 648 S.E.2d 186 (2007).

Physician's affidavit.

In a professional malpractice case brought by a married couple, an expert's original affidavit was insufficient under O.C.G.A. §§ 24-9-67.1 and 9-11-9.1, which applied retroactively. Although the expert avowed therein that the expert had been licensed to practice medicine since 1974, the affidavit contained nothing concerning the expert's recent or continuing experience as an orthopedist. *Cogland v. Hosp. Auth.*, 290 Ga. App. 73, 658 S.E.2d 769 (2008).

Expert's testimony was properly excluded in a medical malpractice suit for corrective bladder surgery for perfora-

tions following a hysterectomy because the expert's affidavit demonstrated that the expert was board certified in geriatrics, and the expert had not been engaged in the active practice of gynecology or urology for three of the five years before the patient's operation. *Hope v. Kranc*, 304 Ga. App. 367, 696 S.E.2d 128 (2010).

Medical malpractice expert's affidavit. — In a medical malpractice action, the trial court properly denied a neurosurgeon's motion to dismiss the action, on grounds that the affidavit required under O.C.G.A. § 24-9-67.1 was from an orthopedist and not a fellow neurosurgeon, and was thus insufficient as a matter of law to support the husband and wife's medical malpractice complaint, as the statutory area of practice or specialty in which the opinion was to be given was dictated not by the apparent expertise of the treating physician, but rather by the allegations of the complaint concerning the plaintiff's injury. *Abramson v. Williams*, 281 Ga. App. 617, 636 S.E.2d 765 (2006), cert. denied, 2007 Ga. LEXIS 91 (2007).

An opinion in a O.C.G.A. § 9-11-9.1 expert affidavit that an emergency room physician's failure to treat a patient's leg fracture was below the standard of care and grossly negligent was insufficient to create a jury question. In view of the physician's affidavit, stating that the physician sought no orthopedic consult because a radiologist opined that the x-rays showed no serious fracture, the patient could not prove by clear and convincing evidence that the physician acted with gross negligence, as required under O.C.G.A. § 51-1-29.5(c). *Pottinger v. Smith*, 293 Ga. App. 626, 667 S.E.2d 659 (2008).

In a medical malpractice action, the trial court erred in granting summary judgment to a doctor and a pacemaker clinic because it was for a jury, not the trial court, to resolve a conflict created by an expert's contradictory testimony in an initial affidavit pursuant to O.C.G.A. § 9-11-9.1 and a subsequent deposition, and to determine the expert's credibility. *Patterson v. Bates*, 295 Ga. App. 141, 671 S.E.2d 195 (2008), cert. denied, No. S09C0628, No. S09C0658, 2009 Ga. LEXIS 224, 227 (Ga. 2009).

Nurses.

Trial court erred in denying a hospital's motion to dismiss a medical malpractice complaint in a simple negligence action after the complainant failed to attach an expert witness affidavit pursuant to O.C.G.A. 9-11-9.1, as a nurse's administration of medication to a patient, which was the subject matter of the suit, involved professional skill and judgment to comply with a standard within the professional's area of expertise. *Grady Gen. Hosp. v. King*, 288 Ga. App. 101, 653 S.E.2d 367 (2007).

Complaint alleged that a nurse committed malpractice by not accurately triaging a patient. As the patient's expert nurse had ongoing practical experience in patient triage, and years of practical and teaching experience in supervising patient care, the expert's affidavit filed under O.C.G.A. § 9-11-9.1 was legally sufficient even though the expert had not performed emergency room triage. *Houston v. Phoebe Putney Mem. Hosp., Inc.*, 295 Ga. App. 674, 673 S.E.2d 54 (2009).

Nurse's affidavit insufficient. — A trial court erred in ruling that a registered nurse could provide an expert affidavit regarding a physical therapist's care, given that O.C.G.A. § 9-11-9.1(g) categorized nurses and physical therapists as practicing separate professions, and because an expert was required to meet the conditions of O.C.G.A. § 24-9-67.1 in order to provide a § 9-11-9.1 affidavit. *Ball v. Jones*, 301 Ga. App. 340, 687 S.E.2d 625 (2009).

Conflict in experts' opinions in affidavit. — In a wrongful death and medical negligence suit, a conflict between the testimony of experts in the plaintiff's expert affidavit, filed pursuant to O.C.G.A. § 9-11-9.1, merely raised an issue of fact; it could not be used to eliminate self-contradictory testimony for purposes of summary judgment. *Rooks v. Tenet Health Sys. GB, Inc.*, 292 Ga. App. 477, 664 S.E.2d 861 (2008).

Failure of plaintiff to file an expert affidavit, etc.

Trial court erred by dismissing a couple's renewed negligence complaint for failing to file an expert affidavit with the couple's original complaint as required by

O.C.G.A. § 9-11-9.1(a) because the record failed to contain sufficient findings showing whether any professional negligence was involved with regard to the wife falling from a testing table as it was merely speculative whether the technician had to assess the wife's medical condition in order to decide whether she could get down from a raised table since it could have been that no professional judgment was required. The trial court additionally erred by dismissing the couple's renewed complaint because the defending medical entities waived their objection to the renewal by failing to file a separate motion to dismiss contemporaneously with their answer to the couple's original action. *Chandler v. Opensided MRI of Atlanta, LLC*, 299 Ga. App. 145, 682 S.E.2d 165 (2009), *aff'd*, 287 Ga. 406, 696 S.E.2d 640 (2010).

Affidavit filed with complaint in renewal action.

Because a health care provider simply raised a patient's failure to comply with O.C.G.A. § 9-11-9.1(a) as a defense in the provider's answer rather than in a contemporaneous motion to dismiss, as required by § 9-11-9.1(c), the patient was not precluded from renewing a negligence action pursuant to O.C.G.A. § 9-2-61. *Opensided MRI of Atlanta, LLC v. Chandler*, 287 Ga. 406, 696 S.E.2d 640 (2010).

Sufficiency of affidavit.

Because a dental patient's expert affidavit pursuant to O.C.G.A. § 9-11-9.1 was not based on certified or sworn records, nor was it based on the personal knowledge of the expert, the trial court erred in denying the dentist's motion for summary judgment in the patient's dental malpractice action; although the records custodian had failed to properly provide certified copies of the records upon the patient's discovery request, the patient waived the right to present such evidence pursuant to Ga. Unif. Super. Ct. R. 6.2 where the patient did not file a timely response to the dentist's summary judgment with an O.C.G.A. § 9-11-56(f) affidavit, and the patient did not show excusable neglect for purposes of O.C.G.A. § 9-11-60(b). *Rudd v. Paden*, 279 Ga. App. 141, 630 S.E.2d 648 (2006).

Challenge to sufficiency of affidavit.

Trial court erred in granting a hospital's motion to dismiss a survivor's wrongful death action based on O.C.G.A. § 9-11-9.1(e) because of a nurse's affidavit that allegedly failed to comply with O.C.G.A. § 24-9-67.1(c)(2) and (e) and because the trial court did not consider the survivor's other affidavit submitted, an unchallenged affidavit from a medical doctor. An affidavit should be construed most favorably to the plaintiff and all doubts should be resolved in plaintiff's favor, even if an unfavorable construction of the affidavit may be possible, so long as such construction does not detract from the purpose of § 9-11-9.1 of reducing the number of frivolous malpractice suits. *Piscitelli v. Hosp. Auth. of Valdosta & Lowndes County*, 302 Ga. App. 746, 691 S.E.2d 615 (2010).

Dismissal of the patient's medical malpractice action was erroneous because the doctors failed to allege "with specificity" in the doctors' motion to dismiss, as required by O.C.G.A. § 9-11-9.1(e), the ground upon which the trial court dismissed the action, that the affidavits filed with the patient's complaint were inadequate because the affidavits said nothing of gross negligence. *Ndlovu v. Pham*, No. A11A1716, 2012 Ga. App. LEXIS 192 (Feb. 24, 2012).

Qualification of affiant.

When a couple who filed a medical malpractice case did not show that their experts had actual professional knowledge and experience through active practice or by teaching during at least three of the last five years, the trial court properly held under O.C.G.A. §§ 9-11-9.1 and 24-9-67.1 that the experts were not qualified to give an opinion and dismissed the case. *Akers v. Elsey*, 294 Ga. App. 359, 670 S.E.2d 142 (2008).

Trial court did not err in dismissing a medical malpractice action on the ground that an anesthesiologist's affidavit in support of the complaint was insufficient under O.C.G.A. § 9-11-9.1 because the anesthesiologist did not meet the licensing requirement for expert witnesses, O.C.G.A. § 24-9-67.1(c)(1); although the anesthesiologist's amended affidavit in support of a medical malpractice complaint indicated that the anesthesiologist

held a medical license from Pennsylvania on the date of the alleged negligent act, there was no evidence that the anesthesiologist was practicing in that state. *Craig v. Azizi*, 301 Ga. App. 181, 687 S.E.2d 198 (2009).

“Period of limitation.”

In a wrongful death suit, a medical center was properly granted partial summary judgment as to an administrator’s claims of nursing malpractice since the amended complaint alleged the claims were not filed within the two-year statute of limitation period set forth in O.C.G.A. § 9-3-33. *Thomas v. Medical Ctr.*, 286 Ga. App. 147, 648 S.E.2d 409 (2007), cert. denied, 2007 Ga. LEXIS 699 (Ga. 2007).

Application to professional negligence claims only and not attorney retainer agreement. — In a former client’s suit for fraud, breach of contract, and other claims against a former attorney for the attorney’s failure to refund a retainer after being fired, the trial court only partially erred by denying the attorney’s motion to dismiss the complaint for failure to comply with the expert affidavit requirement of O.C.G.A. § 9-11-9.1 with regard to the former client’s breach of contract claims as § 9-11-9.1 applies to professional negligence claims only and, on the face of the complaint, the appellate court was unable to determine whether the former client’s breach of contract claim against the attorney involved the use of the attorney’s professional judgment and skill. The appellate court noted that any breach of contract claim not involving the

attorney’s professional judgment and skill remained pending in the trial court. *Nash v. Studdard*, 294 Ga. App. 845, 670 S.E.2d 508 (2008).

Construction program manager. — Specifically, with regard to a professional negligence claim, O.C.G.A. § 9-11-9.1(a), which requires a plaintiff asserting a professional negligence claim to submit an expert affidavit along with the complaint to set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim applies to professional malpractice claims alleging professional negligence; as the plaintiff, a surety, failed to provide the court with any evidence that the defendant, a construction program manager (CPM), hired to oversee school construction projects, was a professional as defined by any code sections, the school board could not have maintained an action against the CPM for professional malpractice, and neither could the surety as subrogee. *Carolina Cas. Ins. Co. v. R.L. Brown & Assocs.*, No. 1:04-cv-3537-GET, 2006 U.S. Dist. LEXIS 71056 (N.D. Ga. Sept. 29, 2006).

Cited in *Chatham Orthopaedic Surgery Ctr., LLC v. White*, 283 Ga. App. 10, 640 S.E.2d 633 (2006); *Davenport v. Cummins Alabama, Inc.*, 284 Ga. App. 666, 644 S.E.2d 503 (2007); *In re Carter*, 288 Ga. App. 276, 653 S.E.2d 860 (2007); *UniFund Fin. Corp. v. Donaghue*, 288 Ga. App. 81, 653 S.E.2d 513 (2007); *Emory Adventist, Inc. v. Hunter*, 301 Ga. App. 215, 687 S.E.2d 267 (2009).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Discovery date in medical malpractice litigation, 26 POF3d 185.

9-11-9.2. Medical authorization forms; review of protected health information.

(a) In any action for damages alleging medical malpractice against a professional licensed by the State of Georgia and listed in subsection (g) of Code Section 9-11-9.1, against a professional corporation or other legal entity that provides health care services through a professional licensed by the State of Georgia and listed in subsection (g) of Code Section 9-11-9.1, or against any licensed health care facility alleged to

be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (g) of Code Section 9-11-9.1, contemporaneously with the filing of the complaint, the plaintiff shall be required to file a medical authorization form. Failure to provide this authorization shall subject the complaint to dismissal.

(b) The authorization shall provide that the attorney representing the defendant is authorized to obtain and disclose protected health information contained in medical records to facilitate the investigation, evaluation, and defense of the claims and allegations set forth in the complaint which pertain to the plaintiff or, where applicable, the plaintiff's decedent whose treatment is at issue in the complaint. This authorization includes the defendant's attorney's right to discuss the care and treatment of the plaintiff or, where applicable, the plaintiff's decedent with all of the plaintiff's or decedent's treating physicians.

(c) The authorization shall provide for the release of all protected health information except information that is considered privileged and shall authorize the release of such information by any physician or health care facility by which health care records of the plaintiff or the plaintiff's decedent would be maintained. (Code 1981, § 9-11-9.2, enacted by Ga. L. 2005, p. 1, § 4/SB 3; Ga. L. 2007, p. 216, § 2/HB 221.)

The 2007 amendment, effective July 1, 2007, substituted "subsection (g)" for "subsection (d)" three times in subsection (a) See Editor's note for applicability.

Editor's notes. — Ga. L. 2007, p. 216, § 3, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2007, and shall apply to any action filed on or after July 1, 2007."

Law reviews. — For article on 2005

enactment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For article, "Georgia's New Expert Witness Rule: Daubert and More," see 11 Ga. St. B.J. 16 (2005). For survey article on insurance law, see 59 Mercer L. Rev. 195 (2007). For survey article on law of torts, see 59 Mercer L. Rev. 397 (2007). For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007).

JUDICIAL DECISIONS

Preemption by federal HIPAA law. — Hospital's motion to dismiss a medical malpractice action filed against it based on an individual's failure to comply with the medical record release requirement of O.C.G.A. § 9-11-9.2, was upheld on appeal, as the court concluded that: (1) section 9-11-9.2 was preempted by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191; (2) the authorization set forth in § 9-11-9.2 did not satisfy the requirements for a valid HIPAA authorization; (3) the Georgia statute did not require a description of the information to be used or

disclosed that specifically identified the information in a meaningful fashion; (4) the statute did not provide for an expiration date or event that related to the individual or the purpose of the use or disclosure; and (5) the statute did not contain notice of a right to revoke the authorization. Northlake Med. Ctr., LLC v. Queen, 280 Ga. App. 510, 634 S.E.2d 486 (2006).

Because the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191; 42 U.S.C. § 1320d et seq. (HIPAA), preempted O.C.G.A. § 9-11-9.2, a patient did not have to comply with the

filing requirements of the state law prior to filing a medical malpractice action against two hospitals; hence, the trial court properly granted the patient a protective order from having to contemporaneously comply with the filing requirements of O.C.G.A. § 9-11-9.2. *Crisp Reg'l Hosp., Inc. v. Sanders*, 281 Ga. App. 393, 636 S.E.2d 123 (2006).

Administratrix in a medical malpractice action authorized a release of the decedent's medical records, and the medical practice moved to dismiss the complaint on the ground that the authorization did not comply with O.C.G.A.

§ 9-11-9.2; the motion was properly denied, as O.C.G.A. § 9-11-9.2 was preempted by the Federal Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d et seq. *Griffin v. Burden*, 281 Ga. App. 496, 636 S.E.2d 686 (2006).

O.C.G.A. § 9-11-9.2 is preempted by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) since § 9-11-9.2 is less stringent and does not comply with the requirements of HIPAA as to notice of the right to revoke. *Allen v. Wright*, 282 Ga. 9, 644 S.E.2d 814 (2007).

9-11-10. Form of pleadings.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
NAMES OF PARTIES
EXHIBITS

General Consideration

Proper remedy for seeking more particularity. — Trial court erred in granting the defendants' motions to dismiss the plaintiffs' complaint for failure to state a claim upon which relief could be granted and for judgment on the pleadings because the trial court should have required the plaintiffs to amend the plaintiffs' complaint and provide a more definite statement of the plaintiffs' claims before passing upon the motions; the amended complaint was a "shotgun pleading" because the complaint was not a short and plain statement of the claims that the plaintiffs asserted as required by the Civil Practice Act, O.C.G.A. § 9-11-8(a)(2)(A), the complaint did not give the defendants fair notice of the nature of the claims, and the complaint did not conform to several of the specific pleading requirements of the Act, specifically O.C.G.A. §§ 9-11-8, 9-11-9, and 9-11-10. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

More definitive statement. — Requiring the plaintiff to make a more definitive statement of his or her claim saves judicial resources and permits the trial

court, when a sufficiently more definite statement has been pled, to determine whether the complaint states a claim by applying the usual standards for the legal adequacy of a complaint; although the Civil Practice Act does not expressly authorize a court to order a more definite statement in the absence of a motion, O.C.G.A. § 9-11-12(e), there is no reason that a court cannot do so as an exercise of the court's inherent powers to manage the court's docket and to compel compliance with the rules and requirements of civil procedure. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

When a trial court orders a plaintiff to make a more definite statement of his or her claims, the court should identify the ways in which the complaint fails to conform to the pleading requirements of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, and the court also should warn the plaintiff about the potential consequences of a failure to replead in a way that conforms to these requirements; if the court still cannot ascertain the nature of the claims that the plaintiff seeks to assert, the court may enter another order to replead again, but the trial court and the defendants need not become caught in an endless

cycle of attempts to replead, and if it appears that a plaintiff is unable or unwilling to plead in conformance to the Civil Practice Act and the directions of the court, the court may be authorized in some cases to dismiss the complaint, not for a failure to state a claim, but for disregard of the rules and orders of the court. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

Cited in *Perry Golf Course Dev., LLC v. Hous. Auth.*, 294 Ga. App. 387, 670 S.E.2d 171 (2008); *Fernandez v. WebSingularity, Inc.*, 299 Ga. App. 11, 681 S.E.2d 717 (2009).

Names of Parties

Leave of court required to correct capacity of party. — Failing to name a county board member in the board mem-

ber's individual capacity is not a mere misnomer that can be corrected without leave of court under O.C.G.A. § 9-11-10(a). *Board of Comm'rs v. Johnson*, 311 Ga. App. 867, 717 S.E.2d 272 (2011).

Exhibits

Properly considered in motion to dismiss. — In city's suit against a landowner for specific performance of parties' agreement, city's complaint attached the parties' agreement along with several other exhibits, which under O.C.G.A. 9-11-10(c) were properly considered by trial court in ruling upon landowner's motion to dismiss under O.C.G.A. § 9-11-12(b)(6). *Gold Creek SL, LLC v. City of Dawsonville*, 290 Ga. App. 807, 660 S.E.2d 858 (2008).

9-11-11. Signing of pleadings; when verification required; rule abolished.

JUDICIAL DECISIONS

Failure to sign may be amended.

Trial court properly found that a client's failure to sign the original answer to a law firm's complaint on an open account was an amendable defect which was cured by subsequently-filed signed and verified amended answers under O.C.G.A. § 9-11-15(a) because the amended answers were filed before the entry of any pretrial order and the firm did not show that its case was prejudiced; the original

answer was not a nullity under O.C.G.A. § 9-11-1(a) because the client's name on the signature line, placed there at the client's request by an attorney who represented the client in a divorce, evinced the client's intent to answer the complaint. *Edenfield & Cox, P.C. v. Mack*, 282 Ga. App. 816, 640 S.E.2d 343 (2006).

Cited in *McCullers v. Harrell*, 298 Ga. App. 798, 681 S.E.2d 237 (2009).

9-11-11.1. Exercise of rights of freedom of speech and right to petition government for redress of grievances; legislative findings; verification of claims; definitions; procedure on motions; exception; attorney's fees 'and expenses.

Law reviews. — For survey article on legal ethics, see 59 *Mercer L. Rev.* 253 (2007). For survey article on trial practice and procedure, see 59 *Mercer L. Rev.* 423 (2007). For survey article on local govern-

ment law, see 60 *Mercer L. Rev.* 263 (2008). For survey article on zoning and land use law, see 60 *Mercer L. Rev.* 457 (2008).

JUDICIAL DECISIONS

Construction with other law. — Upon a proper appeal from a final order, while neither O.C.G.A. § 24-9-67.1 nor O.C.G.A. § 9-11-16 required that a complaint be dismissed or stricken for failing to comply with the terms of those statutes, unlike the Anti-SLAPP statute, codified at O.C.G.A. § 9-11-11.1, because the trial court did not enter a final judgment within the meaning of O.C.G.A. § 9-11-68(b)(1), attorney fees were properly denied; moreover, as to the claim that dismissing and refile in another court constitutes “improper judge shopping,” obtaining a different judge was simply the result of the action, not necessarily the reason for doing so. *McKesson Corp. v. Green*, 286 Ga. App. 110, 648 S.E.2d 457 (2007), cert. denied, 2007 Ga. LEXIS 656 (Ga. 2007).

There is no requirement that a party first seek to invoke O.C.G.A. § 9-15-14 or O.C.G.A. § 51-7-80 before seeking the protections of O.C.G.A. § 9-11-11.1. *Hagemann v. City of Marietta*, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

Voluntary dismissal of a lawsuit by a plaintiff does not preclude the imposition of a sanction under O.C.G.A. § 9-11-11.1(f). *Hagemann v. Berkman Wynhaven Assoc., L.P.*, 290 Ga. App. 677, 660 S.E.2d 449 (2008).

Inapplicable to parody on trademark suit. — Anti-SLAPP statute, O.C.G.A. § 9-11-11.1, did not apply in a trademark infringement/dilution by tarnishment countersuit filed by a national discount store chain in response to plaintiff’s declaratory judgment action because plaintiff’s unflattering parodies of the store’s trademarks were not made in an official proceeding but were printed on t-shirts and other items that were sold on-line. *Smith v. Wal-Mart Stores, Inc.*, 475 F. Supp. 2d 1318 (N.D. Ga. 2007).

Stay of proceedings. — Trial court did not err in holding a hearing on bond validation issues after denying a motion to strike brought by intervenors in the action based on the anti-SLAPP statute, O.C.G.A. § 9-11-11.1, because subsection (d) allowed the trial court to hold a hear-

ing in spite of the stay provisions, and the motion to strike was meritless. *Citizens for Ethics in Gov’t, LLC v. Atlanta Dev. Auth.*, 303 Ga. App. 724, 694 S.E.2d 680 (2010), cert. denied, No. S10C1350, 2010 Ga. LEXIS 722 (Ga. 2010).

Attorney’s duty to advise. — While an attorney was shielded from liability as to the issue of whether a breach occurred as to the duty of care owed to the clients by failing to verify the complaint pursuant to O.C.G.A. § 9-11-11.1(b), opting instead to dismiss the complaint and refile it as a renewal action, summary judgment as to the issues of harm to the clients and a breach of the duty of ordinary care as a result of the attorney’s failure to advise was reversed. *Chatham Orthopaedic Surgery Ctr., LLC v. White*, 283 Ga. App. 10, 640 S.E.2d 633 (2006).

False verification. — A city’s counterclaims to a landowner’s declaratory judgment action challenging a rezoning decision were falsely verified and thus should have been dismissed; the counterclaims did not establish abusive litigation under O.C.G.A. § 51-7-84(b) because the declaratory judgment action had not terminated. *Hagemann v. City of Marietta*, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

Failure to verify complaint.

Trial court did not err in dismissing a former employee’s action alleging that the consultants slandered the former employee and interfered with the former employee’s business relations with a county school district because it properly found that verification under the Georgia anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, O.C.G.A. § 9-11-11.1(a) and (b), was required when the speech at issue could reasonably be construed as constitutionally protected free speech to which the anti-SLAPP statute applied; the county school board’s consideration or review of the issue of how to implement a computer program in the county schools was an “official proceeding authorized by law” within the meaning of the anti-SLAPP statute, the consultants made written or oral statements to the board in connection with the issue under

consideration or review, and nothing in the anti-SLAPP statute rendered the verification requirement inapplicable just because the consultants acted while engaged in a commercial transaction. *Lovett v. Capital Principles, LLC*, 300 Ga. App. 799, 686 S.E.2d 411 (2009).

O.C.G.A. § 9-11-11.1(a), Georgia's Anti-SLAPP statute, encompassed a press conference held outside the territorial limits of Georgia by New York defendants. Because the press conference was held to address an issue under consideration by a judicial body, i.e., a nuisance lawsuit filed by the New York defendants against gun dealers, a Georgia gun dealer's slander suit was dismissed for failure to file a verification as required by § 9-11-11.1(b). *Adventure Outdoors, Inc. v. Bloomberg*, 307 Ga. App. 356, 705 S.E.2d 241 (2010), cert. denied, No. S11C0648, 2011 Ga. LEXIS 402; cert. denied, U.S. , 132 S. Ct. 763, 181 L. Ed. 2d 485 (2011).

Verification of counterclaims required. — A landowner's declaratory judgment action challenging a city's rezoning decision constituted a petition to the judiciary for a redress of grievances in connection with an issue of public interest or concern, and the city's counterclaims were filed in response to the declaratory judgment action; thus, verification of the counterclaims was required. *Hagemann v. City of Marietta*, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

Counterclaims do not fall outside of the verification requirements of O.C.G.A. § 9-11-11.1, which mandates verification for any claim asserted against a person or entity arising from an act by that person or entity which could reasonably be construed as an act in furtherance of the right to free speech or the right to petition the government for a redress of grievances. *Hagemann v. City of Marietta*, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

Dispute pertaining to development of property.

Because O.C.G.A. § 9-11-11.1, the anti-SLAPP statute, was not intended to immunize from the consequences of abusive litigation a party who asserted a claim with respect to which there existed

such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, the statute did not apply to a county's claim for attorney's fees under O.C.G.A. § 9-15-14, after the county was granted summary judgment on a property buyer's complaint that the buyer was entitled to a written verification of zoning compliance; hence, the trial court did not err in denying the county's motion to dismiss the county's request. *EarthResources, LLC v. Morgan County*, 281 Ga. 396, 638 S.E.2d 325 (2006).

Dismissal not authorized.

Upon certiorari review, because a parent did not perform any act which could reasonably be construed as a statement or petition within the anti-SLAPP statute, O.C.G.A. § 9-11-11.1, the Court of Appeals of Georgia correctly reversed dismissal of a personal care provider's tortious interference with business relationship and libel per se action filed against the parent; moreover, the Court of Appeals correctly refused to expand the scope of the anti-SLAPP statute so as to encompass a wide range of speech and conduct which was arguably connected with any issue of public interest or concern, but instead, restrict its application to those statements which came within the definition within O.C.G.A. § 9-11-11.1(c). *Berryhill v. Ga. Cmty. Support & Solutions, Inc.*, 281 Ga. 439, 638 S.E.2d 278 (2006).

Statements to law enforcement in furtherance of criminal investigation. — Hindu temple's serial filing of civil complaints against individuals lawfully reporting alleged unlawful credit card fraud activity by the temple was a clear example of the type of abuse of judicial process that O.C.G.A. § 9-11-11.1 aimed to deter, and the individuals' statements to law enforcement in furtherance of a criminal investigation were privileged. Therefore, dismissal of the temple's defamation and malicious prosecution claims, along with an award of attorney's fees, was proper. *Hindu Temple & Cmty. Ctr. of the High Desert, Inc. v. Raghunathan*, 311 Ga. App. 109, 714 S.E.2d 628 (2011), cert. dismissed, 2012 Ga. LEXIS 49 (Ga. 2012).

Attorney fees. — When the trial court should have dismissed a city's counterclaims against a landowner as improperly verified, remand was required to determine the issue of the landowner's entitlement to attorney fees under O.C.G.A. § 9-11-11.1. *Hagemann v. City of Marietta*, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

Trial court abused the court's discretion by not awarding attorney's fees or other sanction. — In a suit brought by a developer against a landowner asserting tortious interference

with business relations and other claims, a trial court abused the court's discretion by denying the landowner's motion for attorney fees under O.C.G.A. § 9-11-11.1 since the developer's lawsuit was voluntarily dismissed as the verification in the complaint was proven false and the voluntary dismissal of the suit did not replace the mandate upon the trial court to fashion an appropriate sanction in the court's discretion in favor of the landowner. *Hagemann v. Berkman Wynhaven Assoc., L.P.*, 290 Ga. App. 677, 660 S.E.2d 449 (2008).

9-11-12. Answer, defenses, and objections; when and how presented and heard; when defenses waived; stay of discovery.

(a) **When answer presented.** A defendant shall serve his answer within 30 days after the service of the summons and complaint upon him, unless otherwise provided by statute. A cross-claim or counterclaim shall not require an answer, unless one is required by order of the court, and shall automatically stand denied.

(b) **How defenses and objections presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion in writing:

- (1) Lack of jurisdiction over the subject matter;
- (2) Lack of jurisdiction over the person;
- (3) Improper venue;
- (4) Insufficiency of process;
- (5) Insufficiency of service of process;
- (6) Failure to state a claim upon which relief can be granted;
- (7) Failure to join a party under Code Section 9-11-19.

A motion making any of these defenses shall be made before or at the time of pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or

fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Code Section 9-11-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Code Section 9-11-56.

(c) **Motion for judgment on the pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Code Section 9-11-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Code Section 9-11-56.

(d) **Preliminary hearings.** The defenses specifically enumerated in paragraphs (1) through (7) of subsection (b) of this Code section, whether made in a pleading or by motion, and the motion for judgment mentioned in subsection (c) of this Code section shall be heard and determined before trial on application of any party unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) **Motion for more definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a proper responsive pleading, he shall nevertheless answer or respond to the best of his ability, and he may move for a more definite statement. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 15 days after notice of the order, or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) **Motion to strike.** Upon motion made by a party within 30 days after the service of the pleading upon him, or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) **Consolidation of defenses in motion.** A party who makes a motion under this Code section may join with it any other motions provided for in this Code section and then available to him. If a party makes a motion under this Code section but omits therefrom any defense or objection then available to him which this Code section permits to be raised by motion, he shall not thereafter make a motion

based on the defense or objection so omitted, except a motion as provided in paragraph (2) of subsection (h) of this Code section on any of the grounds there stated.

(h) Waiver or preservation of certain defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived:

(A) If omitted from a motion in the circumstances described in subsection (g) of this Code section; or

(B) If it is neither made by motion under this Code section nor included in a responsive pleading, as originally filed.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Code Section 9-11-19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under subsection (a) of Code Section 9-11-7, or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears, by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(i) **Officer's defense of service.** The officer making service of process and the principal officer in charge of service made by a deputy need not be made a party to any action or motion where the defense or defenses under paragraph (2), (4), or (5) of subsection (b) of this Code section are asserted by motion or by answer. Any party to the action may give notice of the objection to the service, made pursuant to such paragraphs, to the officer making the service and to the principal officer in case of service made by a deputy, and the court shall afford the officer or officers opportunity to defend the service, in which case the decision on the question of service shall be conclusive on the officer and on his principal in case of service by a deputy.

(j) Stay of discovery.

(1) If a party files a motion to dismiss before or at the time of filing an answer and pursuant to the provisions of this Code section, discovery shall be stayed for 90 days after the filing of such motion or until the ruling of the court on such motion, whichever is sooner. The court shall decide the motion to dismiss within the 90 days provided in this paragraph.

(2) The discovery period and all discovery deadlines shall be extended for a period equal to the duration of the stay imposed by this subsection.

(3) The court may upon its own motion or upon motion of a party terminate or modify the stay imposed by this subsection but shall not extend such stay.

(4) If a motion to dismiss raises defenses set forth in paragraph (2), (3), (5), or (7) of subsection (b) of this Code section or if any party needs discovery in order to identify persons who may be joined as parties, limited discovery needed to respond to such defenses or identify such persons shall be permitted until the court rules on such motion.

(5) The provisions of this subsection shall not modify or affect the provisions of paragraph (2) of subsection (f) of Code Section 9-11-23 or any other power of the court to stay discovery. (Ga. L. 1966, p. 609, § 12; Ga. L. 1967, p. 226, § 9; Ga. L. 1968, p. 1104, § 3; Ga. L. 1972, p. 689, §§ 4, 5; Ga. L. 1993, p. 91, § 9; Ga. L. 2009, p. 73, § 4/HB 29.)

The 2009 amendment, effective July 1, 2009, added subsection (j). See the Editor's note for applicability.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2009, the formatting of subsection (j) was modified to be consistent with the other subsections of this Code section.

Editor's notes. — Ga. L. 2009, p. 73, § 5, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to motions to dismiss filed after July 1, 2009.

Law reviews. — For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006).

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General Consideration

Subject matter jurisdiction cannot be conferred by agreement or waived. — The Georgia Supreme Court disapproves language suggesting that

parties can confer subject matter jurisdiction on a court by agreement or waive the defense by failing to raise it in the trial court. *Abushmais v. Erby*, 282 Ga. 619, 562 S.E.2d 549 (2007).

County enjoyed immunity from negligence and nuisance claims. — Because a county enjoyed sovereign immunity from a pedestrian's negligence and nuisance claims asserted in a personal injury action against the county for its alleged failure to maintain a water meter cover, the trial court properly dismissed the claims. *Rutherford v. DeKalb County*, 287 Ga. App. 366, 651 S.E.2d 771 (2007).

Applicability to negligence complaint in malpractice action. — State court properly denied a clinic's motion to dismiss a negligence complaint which arose out of injuries a patient allegedly sustained by and through the negligence of one of the clinic's employees, as the patient was not suing for medical malpractice, the employee was not a licensed health care provider, and thus the patient was not required to file the necessary affidavit required under O.C.G.A. § 9-11-9.1. *Mt. Orthopedics & Sports Med., P.C. v. Williams*, 284 Ga. App. 885, 644 S.E.2d 868 (2007).

Notice pleading requirements.

Because the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191; 42 U.S.C. § 1320d et seq. (HIPAA), preempted O.C.G.A. § 9-11-9.2, a patient did not have to comply with the filing requirements of the state law prior to filing a medical malpractice action against two hospitals; hence, the trial court properly granted the patient a protective order from having to contemporaneously comply with the filing requirements of O.C.G.A. § 9-11-9.2. *Crisp Reg'l Hosp., Inc. v. Sanders*, 281 Ga. App. 393, 636 S.E.2d 123 (2006).

Heightened federal requirements for stating a claim inapplicable. —

When it was alleged defendant insurance agency held itself out as an expert and that plaintiff insured had a special relationship with the agency and relied on the agency to procure the proper insurance, under Georgia law, it was possible a state court would find a claim was stated and it was error to find the agency was fraudulently joined in the suit involving codefendant insurer and to deny remand; under Georgia's notice pleading standard, the heightened pleading requirements im-

posed on federal plaintiffs in *Iqbal* and *Twombly* had not been adopted and the true test was whether the pleading gave fair notice and stated the elements of the claim plainly and succinctly, and not whether as an abstract matter the pleading stated conclusions or facts. *Stillwell v. Allstate Ins. Co.*, 663 F.3d 1329 (11th Cir. 2011).

Dismissal of action as non-justiciable upheld. — Because city had yet to file a condemnation action against a landowner, landowner's suit seeking a public use determination under O.C.G.A. § 22-1-11 was properly dismissed as the suit failed to present a justiciable controversy, and the city's mere inchoate intention to do so, if at all, did not give rise to a justiciable cause of action; moreover, if the appeals court construed that section to be applicable before the initiation of a condemnation action, the court would render meaningless the phrase "before the vesting of title in the condemnor," because that clarification would be redundant. *Fox v. City of Cumming*, 289 Ga. App. 803, 658 S.E.2d 408 (2008).

Because a provision in an agreement between a minority shareholder and a corporate officer to provide the minority shareholder with management opportunities in the corporation was invalid and unenforceable, the corporation was not a party to that agreement, and the officer entered into the contract in that officer's personal capacity, a breach of contract claim related to the agreement was properly dismissed. *Levy v. Reiner*, 290 Ga. App. 471, 659 S.E.2d 848 (2008).

Because the Georgia Workers' Compensation Board, and not the Health Records Act, O.C.G.A. § 31-33-3, regulated the medical photocopying charges in workers' compensation proceedings, the trial court properly dismissed a declaratory judgment complaint filed by a photocopier, which sought guidance regarding the appropriate fee structure for medical photocopying services in workers' compensation proceedings, for failure to state a claim upon which relief could be granted. *Smart Document Solutions, LLC v. Hall*, 290 Ga. App. 483, 659 S.E.2d 838 (2008).

Dismissal of claims held not treated as adjudication of the merits. — Having ruled that dismissal of claims against an employee was appropriate based on insufficient service, the trial court was then without jurisdiction to rule on whether the complaint against the employee should be dismissed based on the expiration of the statute of limitations under O.C.G.A. § 9-11-12(b)(6). Thus, the dismissal could not be treated as an adjudication of the merits, and *res judicata* did not bar a respondeat superior claim against the employee's employer. *Montague v. Godfrey*, 289 Ga. App. 552, 657 S.E.2d 630 (2008).

Error in granting motion deemed waived. — In a dispute over the use of an easement, because a landowner made no argument and cited no legal authority in support of a claim that the trial court's failure to specifically note its oral denial of a motion to dismiss in its final written order constituted an abuse of discretion, the claim was deemed abandoned under Ga. Ct. App. R. 25(c). *Woodyard v. Jones*, 285 Ga. App. 323, 646 S.E.2d 306 (2007).

The trial court did not err in dismissing an inmate's tort claim alleging false imprisonment and a claim under 42 U.S.C. § 1983 against the department of corrections on sovereign immunity grounds as: (1) the state was shielded from liability against a false imprisonment claim, pursuant to O.C.G.A. § 50-21-24(7); and (2) neither the state nor the department of corrections was a "person," as that term was defined under 42 U.S.C. § 1983. *Watson v. Ga. Dep't of Corr.*, 285 Ga. App. 143, 645 S.E.2d 629 (2007).

Petition for certiorari from conviction for violation of municipal ordinance should contain provisions of ordinance. — Because a city's petition for certiorari plainly and distinctly asserted the errors complained of, the superior court did not err in denying its motion to dismiss; moreover, the record reflected that the bar managers cited for violation of Atlanta, Ga., Code of Ordinances § 10-46 (1995) preserved the issue as to the constitutionality of the ordinance and its enforcement. *City of Atlanta v. Jones*, 283 Ga. App. 125, 640 S.E.2d 698 (2006).

Dismissal erroneously granted because: (1) an amendment to a county sign

ordinance did not moot the claims for damages asserted by contestants that arose from the county's enforcement of the ordinance; and (2) the trial court erroneously relied on a federal decision in support of granting the motion. *Coffey v. Fayette County*, 289 Ga. App. 153, 656 S.E.2d 262 (2008).

Cited in *Hammack v. Hammack*, 281 Ga. 202, 635 S.E.2d 752 (2006); *Lewis v. Waller*, 282 Ga. App. 8, 637 S.E.2d 505 (2006); *Walker County v. Tri-State Crematory*, 284 Ga. App. 34, 643 S.E.2d 324 (2007); *Murray v. Ga. DOT*, 284 Ga. App. 263, 644 S.E.2d 290 (2007); *Hall v. Nelson*, 282 Ga. 441, 651 S.E.2d 72 (2007); *Patterson v. Bristol Timber Co.*, 286 Ga. App. 423, 649 S.E.2d 795 (2007); *In re Carter*, 288 Ga. App. 276, 653 S.E.2d 860 (2007); *City of Demorest v. Town of Mt. Airy*, 282 Ga. 653, 653 S.E.2d 43 (2007); *DeKalb Med. Ctr., Inc. v. Hawkins*, 288 Ga. App. 840, 655 S.E.2d 823 (2007); *Southerland v. Ga. Dep't of Corr.*, 293 Ga. App. 56, 666 S.E.2d 383 (2008); *Spinner v. City of Dallas*, 292 Ga. App. 251, 663 S.E.2d 815 (2008); *Weatherly v. Weatherly*, 292 Ga. App. 879, 665 S.E.2d 922 (2008); *Avion Sys. v. Thompson*, 293 Ga. App. 60, 666 S.E.2d 464 (2008); *Bullington v. Blakely Crop Hail, Inc.*, 294 Ga. App. 147, 668 S.E.2d 732 (2008); *Liu v. Boyd*, 294 Ga. App. 224, 668 S.E.2d 843 (2008); *Acevedo v. Kim*, 284 Ga. 629, 669 S.E.2d 127 (2008); *Savage v. E. R. Snell Contr., Inc.*, 295 Ga. App. 319, 672 S.E.2d 1 (2008); *Houston v. Phoebe Putney Mem. Hosp., Inc.*, 295 Ga. App. 674, 673 S.E.2d 54 (2009); *Ellison v. Southstar Energy Servs., LLC*, 298 Ga. App. 170, 679 S.E.2d 750 (2009); *Neely v. City of Riverdale*, 298 Ga. App. 884, 681 S.E.2d 677 (2009); *Old Republic Nat'l Title Ins. Co. v. Atty. Title Servs.*, 299 Ga. App. 6, 682 S.E.2d 134 (2009); *Herring v. Harvey*, 300 Ga. App. 560, 685 S.E.2d 460 (2009); *Alexander v. Hulsey Envtl. Servs.*, 306 Ga. App. 459, 702 S.E.2d 435 (2010); *Bishop v. Patton*, 288 Ga. 600, 706 S.E.2d 634 (2011); *Oglesby v. Deal*, 311 Ga. App. 622, 716 S.E.2d 749 (2011); *Jones v. Allen*, 312 Ga. App. 762, 720 S.E.2d 1 (2011); *Laurel Baye Healthcare of Macon, LLC v. Neubauer*, No. A11A2367; No. A11A2368, 2012 Ga. App. LEXIS 335 (Mar. 26, 2012).

Answers and Time Therefor

Mere filing of a default summary judgment motion did not result in the entry of a default judgment. — Nothing showed a final or conclusive judgment on the merits in plaintiff home buyer's state court case against defendant companies, and the buyer's mere filing of a default summary judgment motion did not result in the entry of a default judgment; thus, the Rooker-Feldman doctrine did not preclude federal jurisdiction upon removal. *Jones v. Commonwealth Land Title Ins. Co.*, No. 11-13469, 2012 U.S. App. LEXIS 1487 (11th Cir. Jan. 25, 2012) (Unpublished).

Default judgment should have been entered after failure to answer. — Denial of a plaintiff's motion for default judgment against a defendant was error because the defendant did not file an answer, the time for filing an answer was not extended, and under O.C.G.A. § 9-11-55(a), the defendant's case was automatically in default 30 days after being served; further, the defendant did not move to open the default. The trial court's earlier findings on cross-motions for summary judgment regarding the codefendant's lack of contractual liability were irrelevant to the issue of whether the plaintiff was entitled to default judgment. *H.N. Real Estate Group, LLC v. Dixon*, 298 Ga. App. 124, 679 S.E.2d 130 (2009).

Default judgment properly entered due to untimely answer. — Trial court did not err in granting a creditor's motion for default judgment on the ground that a debtor failed to answer the complaint within thirty days pursuant to O.C.G.A. § 9-11-12(a) because the trial court was authorized to conclude that the debtor's counsel executed an acknowledgment and waiver pursuant to O.C.G.A. § 9-10-73, that, therefore, the debtor's answer was due within thirty days after the acknowledgment and waiver, and that because it failed to serve an answer within that thirty-day period, its answer was untimely. O.C.G.A. § 9-11-4 did not apply because the acknowledgment of service the creditor drafted and submitted to the debtor did not make reference to § 9-11-4, and the creditor also did not inform the debtor by means of the text prescribed in

§ 9-11-4(1). *Satnam Waheguru Corp. v. Buckhead Cmty. Bank*, 304 Ga. App. 438, 696 S.E.2d 430 (2010).

Default judgment properly set aside when answer timely filed. — Trial court did not abuse the court's discretion in setting aside a default judgment entered in favor of former police officers under O.C.G.A. § 9-11-60(d) because the default judgment was entered despite the fact that the record disclosed that a pension fund board of trustees timely answered the complaint and, thus, there was no basis upon which to claim a default judgment; the board's answer was filed 31 days after service, but because that day was a Monday and the 30th day after service fell on a Sunday, under O.C.G.A. § 1-3-1(d)(3), the answer was timely. *Stamey v. Policemen's Pension Fund Bd. of Trs.*, 289 Ga. 503, 712 S.E.2d 825 (2011).

Answer timely filed. — City council members filed the members' answer to a photographer's complaint well within the 30-day filing requirement under O.C.G.A. § 9-11-12(a) because one of the members was served with the complaint on December 20, 2007, the other was served on December 26, 2007, the case was removed to federal court on January 11, 2008, and both members filed a joint answer in federal court on January 17, 2008. *Davis v. Wallace*, 310 Ga. App. 340, 713 S.E.2d 446 (2011).

Trial court had jurisdiction over a home inspector, and the inspector was required under the Georgia Civil Practice Act, O.C.G.A. § 9-11-12(a), to file an answer to the purchaser's complaint within 30 days, but because the inspector failed to do so, the inspector was in default. *Strickland v. Leake*, 311 Ga. App. 298, 715 S.E.2d 676 (2011).

How Defenses, etc., Presented

1. In General

No waiver of one year policy provisions. — In an insurer's declaratory judgment action involving the insurer's obligations under a parent's property insurance policy, the insurer was properly granted summary judgment as to a child's claim since that claim was filed past the one

year time limit set forth in the policy, which was a policy renewed in 2004. The child's counterclaim was filed 18 months after the declaratory judgment suit was filed and no waiver of the one year time limit was established. *Morrill v. Cotton States Mut. Ins. Co.*, 293 Ga. App. 259, 666 S.E.2d 582 (2008).

2. Subject Matter Jurisdiction

Failure to raise defense.

In a transferred action between a lessee and its lessors, the superior court properly exercised subject matter jurisdiction over the same, as no action was taken upon the lessee's notice of appeal, but pursuant to the magistrate's transfer order, which was authorized by Ga. Unif. Magis. Ct. R. 36; moreover, the lessors never raised the affirmative defense of lack of subject matter jurisdiction by way of an answer or in a separate motion, as was required by O.C.G.A. § 9-11-12(b)(1), or even in a motion for judgment on the pleadings. *Abushmais v. Erby*, 282 Ga. App. 86, 637 S.E.2d 725 (2006), *aff'd*, 282 Ga. 619, 652 S.E.2d 549 (2007).

Failure to comply with notice provisions under the Georgia Tort Claims Act. — Because: (1) a patron's personal injury claim filed with the claims advisory board (CAB) in no way complied with the ante litem requirements of the Georgia Tort Claims Act; (2) the patron's claim to the CAB was made under a separate statutory scheme set up under Article 4 of Title 28 dealing with the financial affairs of the general assembly, covered under O.C.G.A. § 28-5-60 et seq.; and (3) prior to filing suit, no notice was given to the Risk Management Division of the Department of Administrative Services or the Department of Motor Vehicle Safety, to the extent that the trial court denied the motion of the state to dismiss the patron's claim of \$5,000 or less, the court erred, but the order denying the patron's claim of \$5,000 or more was upheld. *State of Ga. v. Haynes*, 285 Ga. App. 637, 647 S.E.2d 331 (2007).

Matter in abatement.

Because subject matter jurisdiction is a matter in abatement, it had to be resolved on a motion pursuant to O.C.G.A. § 9-11-12(b), and not by a motion for sum-

mary judgment. *First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc.*, 282 Ga. 883, 655 S.E.2d 605 (2008).

Collateral attack on valid default judgment unauthorized. — The trial court properly dismissed a business' contribution action, filed pursuant to O.C.G.A. § 51-12-32, on subject matter jurisdiction grounds, as: (1) its finding that the business was the sole tortfeasor barred the action; (2) that finding was not void; (3) no appeal was taken from that finding; and (4) the suit amounted to an improper collateral attack on the default judgment entered against the business. *State Auto Mut. Ins. Co. v. Relocation & Corporate Hous. Servs.*, 287 Ga. App. 575, 651 S.E.2d 829 (2007), *cert. denied*, 2008 Ga. LEXIS 163 (Ga. 2008).

3. Personal Jurisdiction

Long-arm jurisdiction.

Internet car seller purposefully transacted business in the State of Georgia when its agent conducted business negotiations with a buyer who lived in Georgia and when the seller delivered the vehicle in the state, so as to have established sufficient minimum contacts with the State of Georgia to authorize Georgia's exercise of personal jurisdiction over the seller under the Georgia Long Arm Statute, O.C.G.A. § 9-11-91; moreover, the state court correctly resolved the factual conflict created by the seller's affidavits and supporting documentation in favor of the buyer so as to find, for purposes of the motion to dismiss, that the buyer had not been provided with, nor agreed to, that part of the agreement containing the forum selection clause. *Aero Toy Store, LLC v. Grieves*, 279 Ga. App. 515, 631 S.E.2d 734 (2006).

4. Venue

Forum selection clause upheld. — The trial court erred in dismissing an action for breach of an equipment rental agreement on grounds that the forum selection clause contained therein was overbroad and unconscionable, and thus unenforceable, as: (1) the clause did not grant unfettered discretion to the plaintiff as to where suit could be brought; (2) the lessee

under the agreement clearly had notice that suit could be filed anywhere the plaintiff maintained its principal place of business, but the clause aptly did not allow a suit to be filed in a forum where neither party had a nexus or relationship with the forum state; and (3) there was no evidence that the agreement was procured by fraud. *OFC Capital v. Colonial Distributions*, 285 Ga. App. 815, 648 S.E.2d 140 (2007), cert. denied, 2007 Ga. LEXIS 681 (Ga. 2007).

Movant supported motion by evidence of agreed upon forum selection clause. — In a breach of contract action between an Internet-based business and an Internet advertiser, because the latter presented sufficient evidence to support its motion to dismiss a suit filed in the State of Georgia on personal jurisdiction grounds, given the forum selection clause in the contract designating the agreed-upon forum as the state and federal courts in the State of California, specifically, Los Angeles, and given the business's assent to venue, the advertiser met the advertiser's burden of proving a lack of personal jurisdiction, the trial court properly dismissed the Georgia action. *Alcatraz Media, LLC v. Yahoo! Inc.*, 290 Ga. App. 882, 660 S.E.2d 797 (2008).

Waiver of venue.

A claimant in a civil forfeiture proceeding could not assert on appeal that an order striking the claimant's answer and a final judgment of condemnation were void due to improper venue because the claimant did not raise that defense in the answer, thus waiving the defense under O.C.G.A. § 9-11-12(h). *Gravley v. State of Ga.*, 285 Ga. App. 691, 647 S.E.2d 372 (2007).

5. Process

Dismissal for lack of proper and timely service.

Trial court properly dismissed a plaintiff's personal injury action filed against defendant on insufficient service of process grounds, as: (1) plaintiff did little to pursue service; (2) plaintiff inappropriately shifted the burden of said search on the court; and (3) the fact that defendant served interrogatories and a request for production did not amount to a waiver of

an insufficient service of process defense. *Kelley v. Lymon*, 279 Ga. App. 849, 632 S.E.2d 734 (2006).

Trial court erred in finding that the State Election Board was not properly served with process of an election candidate's challenge to an election contest; but, the candidate's failure to effect timely service of appropriate process of said contest against the mayor-elect required dismissal of said suit. *Swain v. Thompson*, 281 Ga. 30, 635 S.E.2d 779 (2006).

In a personal injury lawsuit, because, as a matter of law, an injured individual failed to carry the burden of showing that a reasonable diligence in attempting to serve the complaint, the trial court abused its discretion in denying a motion to dismiss said complaint; moreover, despite the individual's attempt to argue to the contrary, the applicable test was whether the plaintiff exercised due diligence, not whether the defendant had suffered harm from the delay in service of process. *Duffy v. Lyles*, 281 Ga. App. 377, 636 S.E.2d 91 (2006).

In a personal injury action arising from an auto accident filed two days before the expiration of the applicable statute of limitation, because the record failed to show that the plaintiff acted with the greatest possible diligence to personally serve the defendant, the trial court did not abuse its discretion in dismissing the plaintiff's complaint based on insufficient service of process. *Moody v. Gilliam*, 281 Ga. App. 819, 637 S.E.2d 759 (2006).

Because a personal representative failed to effectuate proper service of a personal injury suit on a passenger of a vehicle involved in an accident in which the decedent was killed, especially after having been placed on notice that service had not been perfected, the passenger's motion to dismiss said suit was properly granted. *Ballenger v. Floyd*, 282 Ga. App. 574, 639 S.E.2d 554 (2006).

Based on sufficient evidence that a resident stood idle for six months after learning of the difficulties in serving a non-resident, the resident's personal injury complaint was properly dismissed on grounds that the resident failed to exercise due diligence in effectuating service of process; hence, the statute of limitations

under O.C.G.A. § 9-3-33 was not tolled. *Livingston v. Taylor*, 284 Ga. App. 638, 644 S.E.2d 483 (2007).

Because the affidavits submitted by the defendant were sufficient to overcome the evidence of the process server's return of process, and the record supported the trial court's finding that the plaintiff did not effect service on the defendant, specifically showing that there was no signature of receipt, no log of event, no notes of service, no detailed description of the defendant, and no request for identification, dismissal of the action was proper *Bohorquez v. Strother*, 287 Ga. App. 98, 650 S.E.2d 765 (2007).

Service of process waived. — No reversible error was found because a contestant in a quiet title action waived service of process, neglected to file any pleadings, and failed to file a record to support the claims of error on appeal, and given that the special master found three independent bases, which on their face supported the judgment entered. *Brown v. Fokes Props. 2002, Inc.*, 283 Ga. 231, 657 S.E.2d 820 (2008).

Service of process held sufficient. — Because a corporation failed in the corporation's burden of showing that the person who actually received service of process was not authorized to accept service on behalf of the corporation's registered agent, the service was properly found to be sufficient. Thus, the trial court was not required to dismiss the action based on a lack of sufficient service of process. *Holmes & Co. v. Carlisle*, 289 Ga. App. 619, 658 S.E.2d 185 (2008).

Because service of process to a person at least 15 years old who resided at the residence listed on the return of service was sufficient, such could not serve as a basis to dismiss the action; moreover, adequate and proper service of process was presumed given that the party charged with service timely filed an answer. *Holmes & Co. v. Carlisle*, 289 Ga. App. 619, 658 S.E.2d 185 (2008).

6. Service

Adoption of party's proposed order not clearly erroneous. — In a dispute over the use of an easement, because a landowner abandoned error regarding the

denial of a motion to dismiss on service of process grounds, and the trial court properly adopted a neighbor's proposed order as its final order, as the landowner failed to support a claim that the findings of fact or conclusions of law were incorrect, the order denying dismissal of the action was upheld on appeal. *Woodyard v. Jones*, 285 Ga. App. 323, 646 S.E.2d 306 (2007).

No right to hearing on motion. — Notwithstanding its caption, a defendant's motion did not seek summary judgment but was in essence a motion to dismiss for insufficiency of service of process under O.C.G.A. § 9-11-12(b)(5); further, the ruling thereupon was not a summary judgment. Therefore, the plaintiff was not entitled to a hearing on the motion under Ga. Unif. Super. Ct. R. 6.3. *McCullers v. Harrell*, 298 Ga. App. 798, 681 S.E.2d 237 (2009), cert. denied, No. S09C1914, 2010 Ga. LEXIS 55 (Ga. 2010).

Issue not waived. — When a spouse in an action under the Family Violence Act raised the issue of insufficiency of service at hearings and proceeded with the merits only after the spouse's motions to dismiss were denied, the spouse's appearances were made subject to the motions, and the spouse could not be deemed to have waived the service issue for appeal. *Loiten v. Loiten*, 288 Ga. App. 638, 655 S.E.2d 265 (2007).

7. Failure to State Claim

Dismissal proper under O.C.G.A. § 9-2-5 where identical case filed in another county. — Appellate court properly dismissed a second fraud and breach of contract action filed in a separate county, which was identical to one previously filed by the same plaintiff against the same defendants, under the prior pending litigation doctrine pursuant to O.C.G.A. § 9-2-5, and not under O.C.G.A. § 9-11-12(b)(6), which acted as a defense to the later filed action. *Kirkland v. Tamplin*, 283 Ga. App. 596, 642 S.E.2d 125, cert. denied, No. S07C0915, 2007 Ga. LEXIS 508 (Ga. 2007); cert. denied, 552 U.S. 1010, 128 S. Ct. 545, 169 L. Ed. 2d 373 (2007).

Action involving trust and minority shareholders. — Because the trial court properly found that a Delaware appraisal

proceeding was the exclusive remedy for a trust, and since the trust was no longer a shareholder in the wake of a corporate merger, it no longer had standing to assert such claims on the corporation's behalf, the trial court properly dismissed the trust's amended complaint for failure to state a claim upon which relief could be granted. *Paul & Suzie Schutt Irrevocable Family Trust v. NAC Holding, Inc.*, 283 Ga. App. 834, 642 S.E.2d 872 (2007), cert. denied, 2007 Ga. LEXIS 644 (Ga. 2007).

Reasonable notice not given — Because a couple's complaint premised on an erroneous listing in a telephone directory failed to allege any of the claims they sought to pursue, specifically, interfering with their right of quiet enjoyment of their property and nuisance, and even after giving the couple the benefit of all reasonable inferences that could be drawn from their complaint, the fact remained that the directory's publisher was not placed on reasonable notice of whether the couple was asserting a claim in equity, contract, or tort, much less whether they were pleading a particular tort such as negligence or libel, the complaint was properly dismissed as failing to state a claim upon which relief could be granted. *Patrick v. Verizon Directories Corp.*, 284 Ga. App. 123, 643 S.E.2d 251 (2007).

Pleading not dismissed unless no facts support claim. — In a medical malpractice action, the trial court properly denied a neurosurgeon's motion to dismiss the action, on grounds that the affidavit required under O.C.G.A. § 24-9-67.1 was from an orthopedist and not a fellow neurosurgeon, and was thus insufficient as a matter of law to support the husband and wife's medical malpractice complaint, as the statutory area of practice or specialty in which the opinion was to be given was dictated not by the apparent expertise of the treating physician, but rather by the allegations of the complaint concerning the plaintiff's injury. *Abramson v. Williams*, 281 Ga. App. 617, 636 S.E.2d 765 (2006), cert. denied, 2007 Ga. LEXIS 91 (2007).

The complaint failed to state a claim, etc.

In an action filed by a buyer seeking specific performance of a land sales con-

tract, the trial court properly dismissed the buyer's complaint, as specific performance was not an available remedy given evidence that one of the sellers, who was one of three siblings that owned the property sought by the buyer, did not authorize a second sibling to sell the property. *Viola E. Buford Family Ltd. P'ship v. Britt*, 283 Ga. App. 676, 642 S.E.2d 383 (2007).

Motion to dismiss improperly denied. — Trial court erroneously denied a motion to dismiss a personal injury action filed by two parents against two social hosts, arising out the death of the parents' 20-year-old daughter, which alleged that the social hosts served the daughter alcohol, and the daughter died when the daughter drunkenly drove into a tree after leaving the social hosts' home, as the action was barred due to the fact that the daughter had already reached the age of majority at the time of the accident. *Penny v. McBride*, 282 Ga. App. 590, 639 S.E.2d 561 (2006), cert. denied, 2007 Ga. LEXIS 223 (Ga. 2007).

Motion to dismiss improperly granted. — In a student's action against a college alleging ordinary and gross negligence, premises liability, and intentional infliction of emotional distress, because the student was not required to present evidence of foreseeability, but instead had to only allege facts that, if proven, could create a factual question for the jury as to whether the violent attack that was the subject of the suit, was foreseeable, the trial court erroneously dismissed the suit at such an early stage of the proceedings for failure to state a claim upon which relief could be granted. *Love v. Morehouse College, Inc.*, 287 Ga. App. 743, 652 S.E.2d 624 (2007).

Because it was possible that a former employee could introduce evidence within the framework of the complaint establishing that the alleged oral defamatory statements were disseminated to other co-workers who had no duty or authority giving them reason to receive the information, the Court of Appeals of Georgia erred in holding otherwise and agreeing with the trial court that the employee failed to state a claim upon which relief could be granted. *Scouten v. Amerisave Mortg. Corp.*, 283 Ga. 72, 656 S.E.2d 820 (2008).

The trial court erroneously dismissed a couple's complaint upon grounds that the complaint failed to state a claim upon which relief could be granted because the complaint alleged intentional torts against an attorney and that attorney's law firm, and not claims of professional malpractice or negligence; therefore, the complaint was not required to be accompanied by an expert's affidavit pursuant to O.C.G.A. § 9-11-9.1. *Walker v. Wallis*, 289 Ga. App. 676, 658 S.E.2d 217 (2008).

Petition for mandamus properly dismissed. — The trial court properly dismissed a landowners' petition for mandamus filed against a judge as premature and for failing to state a claim as the landowner opted to file the petition, but could have requested a hearing to allow the judge an opportunity to rule on the previously filed motions, because the 90-day ruling period applicable to those motions pursuant to O.C.G.A. § 15-6-21(b) had not yet expired at the time the petition had been filed. *Voyles v. McKinney*, 283 Ga. 169, 657 S.E.2d 193 (2008).

Conversion to summary judgment motion.

When matters outside the pleadings are considered by the trial court on a motion to dismiss for failure to state a claim, the motion is converted to a motion for summary judgment pursuant to O.C.G.A. § 9-11-56, and the trial court has the burden of informing the party opposing the motion that the court will consider matters outside the pleadings and that, if the opposing party so desires, the party has no less than 30 days to submit evidence in response to the motion for summary judgment. *Morrell v. Wellstar Health Sys., Inc.*, 280 Ga. App. 1, 633 S.E.2d 68 (2006).

Trial court properly dismissed a class action suit arising out of a breach of a lease agreement and filed by a group of uninsured patients against a hospital for failure to state a claim upon which relief could be granted, which the court converted to a motion for summary judgment, as the class members: (1) failed to timely object to the merits of the oral motion; (2) acquiesced to the evidence in support of the same; and (3) failed to show they were

third-party beneficiaries of the agreement, with sufficient standing to sue upon a breach of its terms. *Davis v. Phoebe Putney Health Sys.*, 280 Ga. App. 505, 634 S.E.2d 452 (2006).

When a party did not object in the trial court to the conversion of a motion to dismiss for failure to state a claim into one for summary judgment, and the party did not challenge or address the conversion on appeal, any objection to the conversion was waived. *Action Concrete v. Portrait Homes - Little Suwanee Point, LLC*, 285 Ga. App. 650, 647 S.E.2d 353 (2007).

When a trial court's order granting a motion to dismiss under O.C.G.A. § 9-11-12(b)(6) was based on the parties' agreement, which was attached to and incorporated in the pleadings, the trial court's consideration of it did not convert the motion to dismiss to a motion for summary judgment. *Brown v. Gadson*, 288 Ga. App. 323, 654 S.E.2d 179 (2007), cert. denied, 2008 Ga. LEXIS 236 (Ga. 2008).

Failure to file expert affidavit. — Motion to dismiss for failure to file expert affidavit under O.C.G.A. § 9-11-9.1 had to be considered as a motion to dismiss for failure to state a claim under O.C.G.A. § 9-11-12(b)(6). *Burke v. Paul*, 289 Ga. App. 826, 658 S.E.2d 430 (2008).

Read in the son and the administrator's favor, the new complaint adequately pled fraud, battery, conspiracy, and wrongful death against the doctors, the nurses, and the hospital as the complaint asserted that the doctor knowingly and falsely represented to the family that the deceased's comatose condition was the result of metastasized cancer rather than aspiration, and that the doctor's intention in doing so was to deceive the family as to its actual cause. The complaint also asserted that the second doctor and the nurses were complicit in the doctor's misrepresentations and assisted the doctor in the deception of the family; that the family relied on the misrepresentations when it agreed to admit the deceased to hospice care; and that as a proximate result of being admitted to hospice, the deceased was denied food and water and suffered renal failure. Therefore, because the son and the administrator were not required to support their

adequately pled claims for fraud, battery, and conspiracy with an O.C.G.A. § 9-11-9.1 affidavit, the trial court erred when the court granted the motion to dismiss the claims. *Estate of Shannon v. Ahmed*, 304 Ga. App. 380, 696 S.E.2d 408 (2010).

Notice of conversion to summary judgment motion required.

In an interpleader action involving a dispute over the payment of health insurance benefits, the trial court properly granted the hospital's motion for a judgment on the pleadings as there was no genuine issue of fact that the hospital was owed the amount for the medical expenses at issue and the trial court found that a purported settlement agreement between the employee's counsel and the hospital for less than the full amount was unenforceable as it lacked consideration. The employee agreed to waive oral argument on all motions pending before the trial court and, therefore, acquiesced in the trial court's procedure of treating the hospital's motion for judgment on the pleadings as one for summary judgment, therefore, the trial court did not err in treating the hospital's motion as such without providing formal notice or in failing to hold a hearing on that motion. *Lamb v. Fulton-DeKalb Hosp. Auth.*, 297 Ga. App. 529, 677 S.E.2d 328 (2009).

Consideration of exhibits. — In city's suit against a landowner for specific performance of parties' agreement, city's complaint attached the parties' agreement along with several other exhibits, which under O.C.G.A. 9-11-10(c) were properly considered by trial court in ruling upon landowner's motion to dismiss under O.C.G.A. § 9-11-12(b)(6). *Gold Creek SL, LLC v. City of Dawsonville*, 290 Ga. App. 807, 660 S.E.2d 858 (2008).

Failure to state a claim by third party beneficiaries. — Trial court did not err in granting a clinic's motion under O.C.G.A. § 9-11-12(b)(6) to dismiss for failure to state a claim the patients' action alleging that the patients were entitled to damages for breach of contract after the clinic where the patients received free outpatient dialysis treatment notified the patients that the clinic was closing because the complaint failed to state a claim

that the patients were entitled as third-party beneficiaries to sue for breach of the contract between the clinic and another medical provider to provide free dialysis treatment for one year after the clinic closed. The contract did not clearly show on the contract's face that the contract was intended for the benefit of the patients as required under O.C.G.A. § 9-2-20(b), and the contract plainly showed that there was no intent to confer third-party beneficiary status on existing clinic outpatients. *Andrade v. Grady Mem'l Hosp. Corp.*, 308 Ga. App. 171, 707 S.E.2d 118 (2011).

Judgments on the Pleadings

1. In General

Complete failure to state cause or defense.

Because the minority members of a limited liability company failed to show at least one of the four criteria required for them to proceed directly instead of derivatively, and the complaint was replete with general allegations of injuries separate and apart from the other shareholders, but the allegations did not demonstrate how this was true, judgment on the pleadings was properly entered against them. *Southwest Health & Wellness, LLC v. Work*, 282 Ga. App. 619, 639 S.E.2d 570 (2006).

Because O.C.G.A. § 33-4-7 applied only to an insurer's bad faith in responding to claims for property damage, an insurer was properly granted a judgment on the pleadings as a complaint asserting that it acted in bad faith in responding to a claimant's claims for personal injury failed to state a claim upon which relief under the statute could be granted. *Mills v. Allstate Ins. Co.*, 288 Ga. App. 257, 653 S.E.2d 850 (2007).

Lack of standing. — Employee's action to enjoin the enforcement of a non-compete clause in a contract between the employer and the employee's desired physician, which was treated as a judgment on the pleadings on appeal, was properly dismissed on standing grounds, as the employee was neither a party to the contract nor an intended beneficiary of the contract. *Haldi v. Piedmont Nephrology*

Assoc., P.C., 283 Ga. App. 321, 641 S.E.2d 298 (2007).

Judgment erroneously denied where court lacked jurisdiction over contempt petition. — Because a trial court lacked jurisdiction to entertain a petition to hold a spouse in contempt of a divorce decree entered in another county in the absence of a petition to modify the decree, the trial court erred in denying that spouse's motion for judgment on the pleadings, or in the alternative, for a change of venue to that county's court that rendered the original judgment of divorce. *Jacob v. Koslow*, 282 Ga. 51, 644 S.E.2d 857 (2007).

Treatment of averments. — In an action to recover under a payment bond filed by a supplier, because the pleadings did not show that the supplier was unable to establish a defect in the notice of commencement, and a general contractor averred in its first affirmative defense that it had filed a notice of commencement with the Clerk of the Superior Court of Fulton County and had posted the notice of commencement at the project site, such an averment had to be considered to be denied by the supplier for purposes of a motion for judgment on the pleadings. *Consol. Pipe & Supply Co. v. Genoa Constr. Servs., Inc.*, 279 Ga. App. 894, 633 S.E.2d 59 (2006).

Judgment on the pleadings reversed. — Construing the pleadings in a light most favorable to showing a question of fact, in an action in which: (1) the pleadings did not disclose with certainty that a supplier would not be entitled to relief in its action against a general contractor and the contractor's surety; and (2) the appeals court did not consider the supplier's averments that its "Notice to Owner/Contractor" complied with O.C.G.A. §§ 10-7-31 and 44-14-361.5 or its admission that it received a copy of the notice of commencement to establish that the general contractor's notice of commencement was otherwise proper and timely filed as required by the statutes, the general contractor and its surety were not entitled to judgment on the pleadings. *Consol. Pipe & Supply Co. v. Genoa Constr. Servs., Inc.*, 279 Ga. App. 894, 633 S.E.2d 59 (2006).

In a worker's suit alleging negligence on the part of a county with regard to the county allegedly failing to properly instruct and supervise the worker in the use of a portable tar kettle machine, the trial court erred by granting the county's motion for a judgment on the pleadings based on sovereign immunity as the worker sufficiently alleged that the machine was a vehicle as contemplated by O.C.G.A. § 33-24-51, which established a waiver of sovereign immunity if the county had purchased liability insurance to cover damages and injuries arising from the use of motor vehicles under the county's management. *Hewell v. Walton County*, 292 Ga. App. 510, 664 S.E.2d 875 (2008).

2. Treatment as Summary Judgment Motion

Right to a hearing. — Trial court erred in failing to grant a client's request for a hearing on a former attorney's motion to dismiss claims for legal malpractice and intentional infliction of emotional distress, because the trial court considered matters outside the pleadings. Under O.C.G.A. § 9-11-12(b), the motion was required to be treated as one for summary judgment and disposed of as provided in O.C.G.A. § 9-11-56, and all parties were to be given a reasonable opportunity to present all material made pertinent to such a motion. *Fitzpatrick v. Harrison*, 300 Ga. App. 672, 686 S.E.2d 322 (2009).

Authority of court to consider matter outside pleadings.

Because the trial court, without objection, considered a contract between the parties and both parties relied heavily on the contract language before the trial court, the movant's motion to dismiss was converted to a motion for summary judgment under O.C.G.A. § 9-11-12(b). *Cox v. Athens Reg'l Med. Ctr., Inc.*, 279 Ga. App. 586, 631 S.E.2d 792 (2006).

Notice of conversion of motion to motion for summary judgment.

Trial court's failure to notify the plaintiffs that, pursuant to O.C.G.A. § 9-11-12(b), the court was converting the defendants' motion to dismiss to a summary judgment motion was not reversible error as the plaintiffs were afforded a full evidentiary hearing and failed to demon-

strate any harm resulting from the lack of notice. *Smith v. Chemtura Corp.*, 297 Ga. App. 287, 676 S.E.2d 756 (2009).

Motion treated as one for summary judgment erroneously denied. — The trial court's order denying dismissal of a fraud claim in a medical malpractice action against a doctor, upon a motion which the trial court treated as one for summary judgment when it considered material beyond the pleadings, was reversed, as there was no evidence that the doctor knew or even suspected that the patient had a pancreatic tumor, or that the doctor withheld information regarding it; thus, the doctrine of equitable estoppel did not apply and the fraud claim was barred by the statute of repose, O.C.G.A. § 9-3-71(b). *Balotin v. Simpson*, 286 Ga. App. 772, 650 S.E.2d 253 (2007), cert. denied, 2007 Ga. LEXIS 803 (Ga. 2007).

Losing party's right to direct appeal. — When motions to dismiss asserted, among other things, that the complaint failed to state a claim and the trial court considered material beyond the pleadings in ruling on the motions to dismiss, those motions were required to be treated as motions for summary judgment, and the losing party maintained the right to a direct appeal from an order granting partial summary judgment. *City of Demorest v. Town of Mt. Airy*, 282 Ga. 653, 653 S.E.2d 43 (2007).

Motion to Strike

Failure to move to strike waived on appeal. — On appeal from an order granting summary judgment to a store in a customer's slip and fall action, the appeals court declined to consider a store's argument that a customer's affidavit was invalid based on discrepancies in its execution, as the store failed to move to strike the affidavit below, resulting in a waiver of this claim on appeal. *Durham v. Patel*, 282 Ga. App. 437, 638 S.E.2d 851 (2006).

Waiver or Preservation of Defenses

1. In General

Failure to raise defense to improper counterclaim did not act as waiver. — Because a change of custody could not be asserted as a counterclaim,

pursuant to O.C.G.A. § 19-9-23, the trial court erred in denying a father's motion to dismiss the same asserted by a mother, and the father's failure to raise the matter as a defense did not act as a waiver, as he filed no response to the counterclaim. *Bailey v. Bailey*, 283 Ga. App. 361, 641 S.E.2d 580 (2007).

No waiver of defenses. — Trial court erred by granting a parent's complaint for modification of child custody and support and changing custody, which was filed in that parent's county of residence, as that county was not the jurisdiction wherein the issue of custody and support was originally litigated and the opposing parent never waived the challenge to the jurisdiction of the trial court via a pro se letter, which merely acknowledged receipt of the complaint; as a result, the judgment granting the change of custody was reversed and the case was remanded to the trial court with directions for the trial court to transfer the case to the trial court of the proper county. *Hatch v. Hatch*, 287 Ga. App. 832, 652 S.E.2d 874 (2007).

2. Personal Jurisdiction, Venue, Process and Service

Defense of insufficient process preserved.

In a family's lawsuit against a driver after a collision, the driver did not waive the driver's defense of failure of service by not raising it in a motion to dismiss the family's claim for attorney fees and costs. The defendant raised lack of service in the defendant's answer; thus, the defense of lack of service was properly before the trial court. *Abimbola v. Pate*, 291 Ga. App. 769, 662 S.E.2d 840 (2008).

Jurisdictional defects are waived by defendant's appearance, etc.

Trial court did not err when the court concluded that, pursuant to O.C.G.A. § 9-11-12(h)(1), a contractor waived objection to the sufficiency of service by a North Carolina deputy sheriff because the contractor appeared in court and filed a responsive pleading and motion, and the contractor failed to raise the issue of service by a North Carolina deputy sheriff in the contractor's first pleading or motion. *Merry v. Robinson*, 313 Ga. App. 321, 721 S.E.2d 567 (2011).

Waiver of improper venue and jurisdictional claims found in divorce case. — Because one of the parties in a divorce trial did not raise a claim that jurisdiction and venue were improper until a motion for new trial, this claim was waived under O.C.G.A. § 9-11-12(h)(1)(B). *Fine v. Fine*, 281 Ga. 850, 642 S.E.2d 698 (2007).

Waiver of venue objection. — Because the trial court erred in opening a default against lenders, the trial court also erred in transferring the case for lack of proper venue. Under O.C.G.A. § 9-11-12(h)(1), by failing to answer, the lenders waived any objection to venue. *Flournoy v. Wells Fargo Bank, N.A.*, 289 Ga. App. 560, 657 S.E.2d 625 (2008).

Waiver of defense of insufficient service. — The trial court's order of forfeiture was upheld on appeal, and thus, was not subject to dismissal as: (1) the trial court was presented with testimony from witnesses other than the affiant, as well as sufficient other evidence, to support the order; (2) the alleged property owner waived any defense of insufficient service; and (3) an alternative code section did not afford the owner relief. *McDowell v. State of Ga.*, 290 Ga. App. 538, 660 S.E.2d 24 (2008).

3. Failure to State Claim, Join Party, or State Defenses

Treatment as motion for summary judgment. — In an action filed by children to recover damages for injuries sustained by their parent in a fall in a nursing home facility, a motion to dismiss the action for failure to state a claim filed by the center that operated the facility was converted to a motion for summary judgment

and, on appeal, was to be reviewed as such; the children, as nonmovants, submitted documentary evidence in response to the motion, and, by doing so, in effect requested that the motion be converted into one for summary judgment and acquiesced in the trial court's decision not to give notice of the actual nature of the pending motion. *Gaddis v. Chatsworth Health Care Ctr., Inc.*, 282 Ga. App. 615, 639 S.E.2d 399 (2006).

Complaint failed to state claim. — Trial court properly dismissed an inmate's petition for a writ of habeas corpus for failing to state a claim upon which relief could be granted, based on a finding that such was prematurely filed in that no governor's warrant had been issued or served from the seeking state at the time the petition was filed and the inmate had only been arrested for Georgia offenses; moreover, to the extent that the inmate might have been seeking to challenge an arrest without a warrant pursuant to O.C.G.A. § 17-13-34, insufficient facts were pled which supported such a claim. *Powell v. Brown*, 281 Ga. 609, 641 S.E.2d 519 (2007).

Case improperly dismissed. — Because a neighbor adequately set forth a cause of action for ejection in their amended complaint, specifically alleging that during the elevation of their own property, the adjacent landowner and its transferee appropriated the neighbor's property to the extent that they placed the fill dirt presently being used as lateral support over the common boundary and onto the neighbor's property, the trial court erred in dismissing the same. *MVP Inv. Co. v. North Fulton Express Oil, LLC*, 282 Ga. App. 512, 639 S.E.2d 533 (2006).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 8B Am. Jur. Pleading and Practice Forms, Desertion and Nonsupport, § 33. 8B Am. Jur. Pleading and Practice Forms, Dismissal, Discontinuance, and

Nonsuit, § 1. 19B Am. Jur. Pleading and Practice Forms, Pleading, §§ 343, 463, 693. 20A Am. Jur. Pleading and Practice Forms, Process, § 169.

9-11-13. Counterclaim and cross-claim.

Law reviews. — For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

COUNTERCLAIMS

1. IN GENERAL
2. COMPULSORY COUNTERCLAIMS
4. COUNTERCLAIMS MATURING OR ACQUIRED AFTER PLEADING
5. OMITTED COUNTERCLAIMS

ADDITIONAL PARTIES

General Consideration

Logical relationship test satisfied.

— Bank sued the bank's customer to recover for an overdraft; before filing the customer's counterclaim, the customer sued the bank in another county. As the customer raised the same claims in the customer's complaint and counterclaim, and as there was a logical relationship between the parties' claims, the customer's counterclaim was compulsory; therefore, the customer's suit against the bank was barred by O.C.G.A. § 9-2-5(a). *Steve A. Martin Agency, Inc. v. PlantersFIRST Corp.*, 297 Ga. App. 780, 678 S.E.2d 186 (2009).

Cited in *Sampson v. Haywire Ventures, Inc.*, 293 Ga. App. 779, 668 S.E.2d 286 (2008).

Counterclaims

1. In General

Application of the prior pending doctrine.

— In a personal injury accident between two drivers, the trial court erroneously denied the first driver's motion to dismiss a counterclaim asserted by the second driver because the second driver had a prior pending action against the first driver in another county, and the parties' status in both actions was identical. Moreover, given the first driver's assurances that the instant suit would be dismissed in favor of defending the second driver's claims in the prior pending action, the denial of the first driver's motion to

dismiss the second driver's counterclaim was inconsistent with the purpose of O.C.G.A. § 9-2-5. *Jenkins v. Crea*, 289 Ga. App. 174, 656 S.E.2d 849 (2008).

2. Compulsory Counterclaims

Res judicata bars later action.

The appeals court agreed with the trial court that the doctrine of res judicata barred the negligence and breach of contract claims asserted by two property owners against a contractor, as: (1) the claims were essentially identical to the allegations in a counterclaim filed in a prior Cherokee County action; (2) the parties in the two cases were identical for purposes of res judicata; and (3) the Cherokee County suit resulted in an adjudication on the merits. *Perrett v. Sumner*, 286 Ga. App. 379, 649 S.E.2d 545 (2007).

4. Counterclaims Maturing or Acquired After Pleading

Counterclaim filed after party added.

— Since an owner's counterclaims were filed after a transferor's son was added as a party, and the owner acknowledged that the owner did not request leave of court to file the counterclaims, the trial court properly dismissed the counterclaims; while the owner claimed that the trial court implicitly considered the claims as properly filed, no evidence in the record supported this claim. *Hale v. Scarborough*, 279 Ga. App. 614, 631 S.E.2d 812 (2006).

5. Omitted Counterclaims

Counterclaim filed after statute of limitations ran. — Trial court did not err

in dismissing a counterclaim for unjust enrichment because the four-year statute of limitations for unjust enrichment claims had run, and purchasers and the holders of two outstanding security deeds never sought leave from the trial court to file a late counterclaim as required by O.C.G.A. § 9-11-13. *Chase Manhattan Mortg. Corp. v. Shelton*, 290 Ga. 544, 722 S.E.2d 743 (2012).

Leave to file late counterclaim properly denied. — In subscribers' class action suit against an internet access provider, the trial court did not abuse the court's discretion by denying the provider's motion under O.C.G.A. § 9-11-13(f) for leave to file omitted compulsory counterclaims against two named subscribers

because: (1) the provider waited one and a half years to seek leave to file the counterclaims; and (2) it knew of the basis for its counterclaim when it filed its answer. *EarthLink, Inc. v. Eaves*, 293 Ga. App. 75, 666 S.E.2d 420 (2008).

Additional Parties

Joinder not required. — Trial court did not err in denying a motion for joinder in that, to the extent that the addition of the principals of a real estate developer to the movant's counterclaim was sought because they were joint tortfeasors with the developer, no joinder was required. *Chaney v. Harrison & Lynam, LLC*, 308 Ga. App. 808, 708 S.E.2d 672 (2011).

9-11-14. Third-party practice.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

THIRD-PARTY PLEADINGS

THIRD-PARTY DEFENDANTS

MOTIONS

General Consideration

Claims inappropriate for adjudication. — Because the claims of fraud by borrowers against a mortgage company employee were not derivative, the claims were inappropriate for adjudication under O.C.G.A. § 9-11-14(a). *McCray v. Fannie Mae*, 292 Ga. App. 156, 663 S.E.2d 736 (2008).

Cited in *Diaz v. Wills*, 286 Ga. App. 357, 649 S.E.2d 353 (2007).

Third-Party Pleadings

Impleader properly denied. — In a dispute between adjoining landowners over title to approximately six acres of land, the trial court properly denied the adjoining neighbors' motion to implead additional third parties, and motion to add those parties as indispensable third parties under O.C.G.A. § 9-11-19(a), because those individuals had no legal interest in the disputed property at the time the neighbors sought to add them. *Pirkle*

v. Turner, 281 Ga. 846, 642 S.E.2d 849 (2007).

Petition treated as third-party complaint. — When an insured seeking to have its insurer defend it against a suit by a student filed a "petition for declaratory judgment" in the same trial court in which the student had filed suit against the insured, instead of impleading the insurer into the pending action, the appellate court would consider the insured's petition to be a third-party complaint, as it appeared that the actions had been effectively consolidated in the trial court and that the trial court had considered the insured's petition as if it had been properly styled a third-party complaint. *Fireman's Fund Ins. Co. v. Univ. of Ga. Ath. Ass'n*, 288 Ga. App. 355, 654 S.E.2d 207 (2007), cert. denied, 2008 Ga. LEXIS 284 (Ga. 2008).

Third-Party Defendants

On grounds of indemnity, subrogation, contribution, warranty,

or the like.

An attorney could not be held solely liable to a court reporting service for \$851.10, representing court reporting fees owed, as the clients the attorney was representing at the time the services were rendered should have been joined in the litigation, pursuant to both O.C.G.A. § 9-11-14(a) and O.C.G.A. § 9-11-19(a), given that: (1) the clients could have been liable to the attorney for all or part of the court reporting fees; and (2) the attorney's claim that the clients made partial payment for the court reporting services also rendered the clients necessary parties for adjudication of this dispute. *Free v. Lankford & Assocs., Inc.*, 284 Ga. App. 328, 643 S.E.2d 771 (2007), cert. denied, 2007 Ga. LEXIS 560 (Ga. 2007).

Motions

Where motion for leave to implead

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 19 Am. Jur. Pleading and Prac-

is not promptly made, etc.

Trial court did not err in denying a defendant contractor's motion to add subcontractors as third-party defendants because the motion was made four years after the initial action for construction defects was brought against the contractor, and the contractor failed to explain why the contractor attempted repairs took two years or why, once the contractor was aware that the problems could not be fixed, the contractor waited another eight months to add the subcontractors. *R. Larry Phillips Constr. Co. v. Muscogee Glass*, 302 Ga. App. 611, 691 S.E.2d 372, cert. denied, No. S10C1105, 2010 Ga. LEXIS 568; cert. denied, No. S10C1094, 2010 Ga. LEXIS 587 (Ga. 2010).

tice Forms, Parties, § 124. 20A Am. Jur. Pleading and Practice Forms, Process, § 3.

9-11-15. Amended and supplemental pleadings.

Law reviews. — For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006). For annual survey

on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

AMENDMENTS, GENERALLY

1. IN GENERAL

2. NAME OR CAPACITY OF PARTY; NEW PARTIES

AMENDMENTS AFTER VERDICTS OR JUDGMENT

AMENDMENTS TO CONFORM TO EVIDENCE

RELATION BACK OF AMENDMENTS

1. IN GENERAL

2. AMENDMENTS CHANGING OR ADDING PARTIES

SUPPLEMENTAL PLEADINGS

General Consideration

Construction with § 50-21-35. — Absent evidence that the Department of Transportation demonstrated actual prej-

udice from a surviving spouse's failure to comply with O.C.G.A. § 50-21-35 by failing to timely amend a damages complaint with a certificate showing service upon the attorney general, a dismissal order

was vacated, and the case was remanded. *Ingram v. DOT*, 286 Ga. App. 220, 648 S.E.2d 729 (2007).

Not applicable to claims under Georgia's Workers' Compensation Act. — O.C.G.A. § 9-11-15(c) has not been incorporated into the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. *McLendon v. Advertising That Works*, 292 Ga. App. 677, 665 S.E.2d 370 (2008).

Amendment to objection to probate. — It was error to dismiss an amended objection to the probate of a will on the ground that the original objection was legally insufficient, as an amendment to a caveat was permitted even when it was the amendment that sustained the validity of the caveat; the original objection put the proponent on notice of the objection, and its amendment the next day to include the grounds of undue influence and mental incapacity was proper under O.C.G.A. §§ 9-11-15 and 15-9-89. *Deering v. Keever*, 282 Ga. 161, 646 S.E.2d 262 (2007).

Implied consent to amendment of defendant's counterclaim in landlord/tenant situation. — Although a trial court erred in awarding a tenant attorney fees under O.C.G.A. § 13-6-11 because the tenant's counterclaim was not independent or viable, the error was harmless since attorney fees were authorized under an amended lease provision allowing attorney fees to the prevailing party. The landlord was not misled or denied the opportunity to defend or offer evidence on the issue because at the first trial, the tenant asserted that it was seeking attorney fees as the prevailing party, and at the second trial, the tenant stated in its opening statement that in addition to seeking attorney fees under § 13-6-11, it was seeking and introducing evidence of attorney fees as recoverable under the lease provision, and having failed to make a contemporaneous objection when the arguments were raised and the evidence introduced, the landlord implicitly consented to the amendment of the pleadings to include the claim and waived any objections thereto. *Sugarloaf Mills Ltd. P'ship v. Record Town, Inc.*, 306 Ga. App. 263, 701 S.E.2d 881 (2010).

No waiver of defenses. — Trial court erred by granting a parent's complaint for

modification of child custody and support and changing custody, which was filed in that parent's county of residence, as that county was not the jurisdiction wherein the issue of custody and support was originally litigated and the opposing parent never waived the challenge to the jurisdiction of the trial court via a pro se letter, which merely acknowledged receipt of the complaint; as a result, the judgment granting the change of custody was reversed and the case was remanded to the trial court with directions for the trial court to transfer the case to the trial court of the proper county. *Hatch v. Hatch*, 287 Ga. App. 832, 652 S.E.2d 874 (2007).

Action for breach of fiduciary duty against a conservator was tried by implied consent although it was not pleaded. — Although the record showed that a conservator did not bring a claim pursuant to O.C.G.A. § 29-5-93(a)(4) in writing, but sought only an accounting pursuant to O.C.G.A. § 29-5-81, the conservator did not object when the administrator raised the issue at the hearing. As a result, the issue of whether the conservator breached the conservator's fiduciary duty was litigated by the implied consent of the parties pursuant to O.C.G.A. § 9-11-15(b). *In re Hudson*, 300 Ga. App. 340, 685 S.E.2d 323 (2009).

Cited in *Backensto v. Ga. DOT*, 284 Ga. App. 41, 643 S.E.2d 302 (2007); *Wright v. Piedmont Prop. Owners Ass'n*, 288 Ga. App. 261, 653 S.E.2d 846 (2007); *Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625, 658 S.E.2d 178 (2008); *Chandler v. Opensided MRI of Atlanta, LLC*, 299 Ga. App. 145, 682 S.E.2d 165 (2009), *aff'd*, 287 Ga. 406, 696 S.E.2d 640 (2010); *Weaver v. State*, 299 Ga. App. 718, 683 S.E.2d 361 (2009); *Pinnacle Benning, LLC v. Clark Realty Capital, LLC*, No. A11A2408, 2012 Ga. App. LEXIS 247 (Mar. 6, 2012).

Amendments, Generally

1. In General

Right to amend is very broad.

Insurer had a duty to provide a defense to its insured because a fact issue existed as to whether the insured's actions in the underlying incident were criminal and/or intentional; although cross-appellant

originally alleged an intentional act on the part of the insured, the cross-appellant removed all factual allegations of intentional conduct and amended the complaint to allege only negligence and gross negligence. In Georgia, a party's right to amend a complaint pursuant to O.C.G.A. § 9-11-15(a) was very liberal. *Nationwide Mut. Fire Ins. Co. v. Kim*, 294 Ga. App. 548, 669 S.E.2d 517 (2008).

Discretion of court.

A trial court did not abuse its discretion by amending a pretrial order to allow for bifurcation of a trial, upon the motion of the defendants, because at the hearing on the motion to amend, the plaintiff never objected on the grounds that the timing of the motion to bifurcate caused any injustice; therefore, no reversible error occurred with regard to the plaintiff's timing argument. *Bolden v. Ruppenthal*, 286 Ga. App. 800, 650 S.E.2d 331 (2007), cert. denied, 2007 Ga. LEXIS 756 (Ga. 2007).

Application of relation back statute to venue. — Trial court did not err in denying a motion filed by a corporate president and the president's spouse to dismiss a corporation's action against them or, in the alternative, to transfer the case because the trial court's application of the relation-back statute, O.C.G.A. § 9-11-15(c), did not violate the constitutional right of the president and the spouse to be sued in the county where they resided under Ga. Const. 1983, Art. VI, Sec. II, Para. VI; because the president and the spouse were not residents of Georgia when the suit was filed, the proper venue had to be determined pursuant to Georgia's Long Arm Statute, O.C.G.A. §§ 9-10-91 and 9-10-93. *Cartwright v. Fuji Photo Film U.S.A., Inc.*, 312 Ga. App. 890, 720 S.E.2d 200 (2011), cert. denied, 2012 Ga. LEXIS 306 (Ga. 2012).

No requirement to answer amended complaint. — Allegations of an amended complaint were deemed denied by operation of law, and because the holding in Division 1 of *Teamsters Local 515 v. Roadbuilders, Inc. of Tennessee*, 249 Ga. 418, 420, 291 S.E.2d 698 (Ga. 1982), and its progeny, e.g., *Wilson Welding Service v. Partee*, 234 Ga. App. 619, 620, 507 S.E.2d 168 (Ga. Ct. App. 1998), conflicted with that rule of law, they were overruled;

a trial court erred in holding that a defendant was required to answer an amended complaint to avoid a default and in defaulting a defendant upon a failure to answer an amended complaint. *Shields v. Gish*, 280 Ga. 556, 629 S.E.2d 244 (2006).

Amendment a matter of right before entry of pretrial order.

Because the trial court had not entered a pretrial order, a patient's spouse was entitled to amend a medical malpractice complaint after the patient's death to add a wrongful death claim as a matter of course and without leave of court. *Wesley Chapel Foot & Ankle Ctr., LLC v. Johnson*, 286 Ga. App. 881, 650 S.E.2d 387 (2007), cert. denied, 2007 Ga. LEXIS 820 (Ga. 2007).

Trial court did not err in considering the claims that a plaintiff asserted in two amendments to a petition, although the amendments were filed after an order granting dissolution of a limited liability company was entered, because the judgment on the dissolution petition was not a final judgment, the defendant's counterclaim had yet to be heard, and no pretrial order had been filed at the time the amendments were made. *Moses v. Pennebaker*, 312 Ga. App. 623, 719 S.E.2d 521 (2011).

Expert affidavits in malpractice actions.

Trial court erred in dismissing a client's amended legal malpractice complaint, which included fraud and breach of fiduciary duty, as the client's failure to file an expert affidavit pursuant to O.C.G.A. § 9-11-9.1 did not result in an automatic adjudication on the merits or preclude said amendment after the expiration of the relevant statute of limitation; further, the appeals court disagreed that the client's fraud and breach of fiduciary duty claims were barred because they arose from the same factual allegations, as the original claim for professional negligence, and because the fraud claim was grounded in intentional conduct, it did not need to be accompanied by an expert affidavit. *Shuler v. Hicks, Massey & Gardner, LLP*, 280 Ga. App. 738, 634 S.E.2d 786 (2006).

Effect on judicial admissions. — If the party amended its pleadings to with-

draw its judicial admissions, it could introduce evidence contravening said admissions, and if such contradictory evidence was admitted, even over the objection of the other party, then under O.C.G.A. § 9-11-15(b), such evidence could be deemed to amend the pleadings to withdraw the admissions. *SAKS Assocs., LLC v. Southeast Culvert, Inc.*, 282 Ga. App. 359, 638 S.E.2d 799 (2006).

Amendment to conform to evidence. — Because it was undisputed that the ultimate issue for trial was whether an option contract between the decedent and the decedent's son covered all, or only some, of the decedent's land, and considerable evidence was presented on that issue at trial, the son's amended pleading to conform to that evidence was properly allowed in order to subserve the presentation of the merits of the action, and the estate failed to show that it was prejudiced by the same. *Morris v. Morris*, 282 Ga. App. 127, 637 S.E.2d 838 (2006).

Amendment after party repositioned as plaintiff. — When a debtor who filed counterclaims against a collection agency was repositioned as the plaintiff after the agency's complaint was dismissed; the debtor was free to add additional claims under O.C.G.A. § 9-11-15(a). *1st Nationwide Collection Agency, Inc. v. Werner*, 288 Ga. App. 457, 654 S.E.2d 428 (2007).

Effect on removal. — Because an employer should not have removed an employee's discrimination case until the state court had ruled on the employee's motion to amend the complaint to add federal claims, there was no basis for removal under 28 U.S.C. § 1446, and removal was premature, requiring remand to state court under 28 U.S.C. § 1447(c). Even though O.C.G.A. § 9-11-15(a) allowed amendment as a matter of course without leave of court, the record did not contain a copy of the amended complaint and there was no indication as to whether a pretrial order or consent agreement limiting the time for amendments to pleadings existed. *Jackson v. Bluecross & Blueshield of Ga., Inc.*, No. 4:08-CV-49 (CDL), 2008 U.S. Dist. LEXIS 91036 (M.D. Ga. Nov. 10, 2008).

Consent to implied amendment of pleadings. — By failing to make a con-

temporaneous objection to documentary evidence and testimony of a landlord's principal, a tenant consented under O.C.G.A. § 9-11-15(b) to the implied amendment of the pleadings to include a claim for the additional unpaid rent; it was not until closing argument that the tenant objected and raised for the first time the issue of whether the landlord could seek rent that had become overdue after the filing of the complaint. *Westmoreland v. JW, LLC*, 313 Ga. App. 486, 722 S.E.2d 102 (2012).

2. Name or Capacity of Party; New Parties

Section in *pari materia* with § 9-11-21.

In a personal injury action, and by reading O.C.G.A. § 9-11-15(a) in *pari materia* with O.C.G.A. § 9-11-21, because a plaintiff sued two parties, but substituted only one, the partnership originally sued was not required to file an answer absent an order from the court to do so, and hence could not be found in default; as a result, the trial court correctly found a proper case was made for the default to be opened. *Marwede v. EQR/Lincoln L.P.*, 284 Ga. App. 404, 643 S.E.2d 766 (2007), cert. denied, 2007 Ga. LEXIS 504 (Ga. 2007).

Subsequently-named corporation lacked standing to appeal from orders against the previously-named corporation as that corporation was not a party to the litigation, was not granted or denied intervention pursuant to a motion to amend with leave of court, and an attempted substitution by the predecessor was more than an attempt to correct a misnomer. *Degussa Wall Sys. v. Sharp*, 286 Ga. App. 349, 648 S.E.2d 687 (2007), cert. denied, 2007 Ga. LEXIS 701 (Ga. 2007).

When O.C.G.A. § 9-11-21 does not apply.

Although a borrower failed to obtain the state court's leave before filing a third amended complaint, as required by O.C.G.A. § 9-11-21, the amended complaint was not ineffective to add a non-diverse attorney and law firm, and the federal district court was able to consider the attorney and law firm in determining the existence of diversity jurisdiction for purposes of the borrower's motion

for remand under 28 U.S.C. § 1447; because the attorney and law firm were substituted for John Does named in the original complaint, O.C.G.A. § 9-11-21 did not apply, rather, O.C.G.A. § 9-11-15(c), which allowed for the substitution by amendment of a John Doe without the state court's leave applied; accordingly, the amendment became effective when it was filed, meaning complete diversity of citizenship did not exist, and remand of the matter to the state court was appropriate. *Peachtree/Stratford, L.P. v. Phoenix Home Life Ins. Co.*, No. 1:06-CV-0514-RWS, 2006 U.S. Dist. LEXIS 28840 (N.D. Ga. May 2, 2006).

Signed amended answer cured failure to sign original answer. — Trial court properly found that a client's failure to sign the original answer to a law firm's complaint on an open account was an amendable defect which was cured by subsequently-filed signed and verified amended answers under O.C.G.A. § 9-11-15(a) because the amended answers were filed before the entry of any pretrial order and the firm did not show that its case was prejudiced; the original answer was not a nullity under O.C.G.A. § 9-11-1(a) because the client's name on the signature line, placed there at the client's request by an attorney who represented the client in a divorce, evinced the client's intent to answer the complaint. *Edenfield & Cox, P.C. v. Mack*, 282 Ga. App. 816, 640 S.E.2d 343 (2006).

Correction of misnomer did not constitute substitution of parties under O.C.G.A. § 9-10-132 or amendment of complaint under O.C.G.A. § 9-11-15(a). — Consumer's lawsuit against a telecommunications company was improperly dismissed because the consumer had effected service, but had wrongly named the company, and correction of the misnomer did not constitute a substitution of the parties under O.C.G.A. § 9-10-132 or an amendment of the complaint under O.C.G.A. § 9-11-15(a); thus, the consumer should not have been required to effect service on the company a second time. *Mathis v. BellSouth Telecomms., Inc.*, 301 Ga. App. 881, 690 S.E.2d 210 (2010).

Capacity of plaintiff.

Although an estate's malpractice action was not initially brought by the real party in interest — the estate's administrator — the administrator was timely substituted as the plaintiff in the action by amendment which, under O.C.G.A. § 9-11-17(a), had the same effect as if the action had been commenced by the real party in interest. Thus, the suit was not time-barred by O.C.G.A. § 9-3-71(b)'s five-year repose period, and a doctor and the health care facilities were not entitled to summary judgment. *Memar v. Styblo*, 293 Ga. App. 528, 667 S.E.2d 388 (2008).

Adding or dropping parties.

In a personal injury action, a trial court did not abuse its discretion by refusing to permit the plaintiff to add a defendant because, under these circumstances, the plaintiff identified the additional party in its amended complaint as a negligent party nearly four months before the expiration of the statute of limitations; the proposed added party met the burden of showing that there was no mistake concerning the proposed added party's identity and that O.C.G.A. § 9-11-15(c) was inapplicable. *Steed v. Wellington Healthcare Servs., LLC*, 285 Ga. App. 446, 646 S.E.2d 517 (2007), cert. denied, 2007 Ga. LEXIS 690 (Ga. 2007).

In a suit by appellants, a company and the company's president, against a law firm, the trial court properly denied a motion to add a partner as a party defendant under O.C.G.A. §§ 9-11-15(c) and 9-11-21 when appellants claimed that the partner had violated the attorney-client privilege. Appellants did not assert that the partner ever personally represented the appellants or any related entities; accordingly, any attorney-privilege implicated in the fax would be that between appellants and the law firm, and not between appellants and the partner individually. *Smith v. Morris, Manning & Martin, LLP*, 293 Ga. App. 153, 666 S.E.2d 683 (2008).

Marketing network properly removed the distributors' action under 28 U.S.C. §§ 1332 and 1441 because the case was not removable until a first amended complaint was filed adding substantially different claims and causing the likely amount in controversy to surpass the ju-

risdictional amount. Thus, removal was timely under 28 U.S.C. § 1446(b), and the adding of a non-diverse distributor as plaintiff was improper without a court order pursuant to O.C.G.A. §§ 9-11-15 and 9-11-21, making the matter completely diverse. *Campbell v. Quixtar, Inc.*, No. 2:08-CV-0044-RWS, 2008 U.S. Dist. LEXIS 46567 (N.D. Ga. June 13, 2008).

Passenger's motion to amend a complaint to include the driver of a car as a defendant in a suit arising from a traffic accident was properly denied because the passenger was unable to establish the third condition of O.C.G.A. § 9-11-15(c); there was no evidence that the passenger was mistaken about the driver's identity as the negligent operator who caused the collision. At a deposition, the passenger testified that the vehicle in which the passenger was riding was hit by a young woman who had spoken to the passenger at the scene immediately following the collision, and that the passenger had no reason to believe that the owner was driving the car at the time of the accident. *Valentino v. Matara*, 294 Ga. App. 776, 670 S.E.2d 480 (2008).

Trial court did not abuse the court's discretion by denying a student's motion for leave to amend the complaint to substitute parties under O.C.G.A. § 9-11-21 as the student did not offer an acceptable excuse or justification for failing to name the proper parties that would warrant the conclusion that the trial court ruled inappropriately. *Riding v. Ellis*, 297 Ga. App. 740, 678 S.E.2d 178 (2009).

Trial court properly dismissed certain parties because no motion was filed pursuant to O.C.G.A. §§ 9-11-15 and 9-11-21 to add the parties and no leave of court was granted to add the parties. *Odion v. Varon*, 312 Ga. App. 242, 718 S.E.2d 23 (2011).

Leave of court required to add a party. — Because the claimants never sought leave of court to add a former county commissioner as a party in the commissioner's individual capacity, any unilateral attempt by the claimants to amend the claimants' complaint in this regard through allegations in an appellate brief was ineffective under O.C.G.A. §§ 9-11-15 and 9-11-21. *Board of Comm'rs*

v. Johnson, 311 Ga. App. 867, 717 S.E.2d 272 (2011).

Grant of motion to correct a misnomer in corporate name inappropriate. — In a negligence suit brought by a pedestrian against an originally named company in the complaint, the trial court abused the court's discretion by granting the pedestrian's motion to correct a misnomer thereby changing the name of the defendant in the action to a limited partnership as the limited partnership was never served with the complaint, delivery of the summons and complaint to the limited partnership's registered agent was insufficient for service as the originally named company was used in the pleadings and the registered agent did not represent that originally named company, and the name change was not a mere correction but more of a party substitution. *Nat'l Office Partners, L.P. v. Stanley*, 293 Ga. App. 332, 667 S.E.2d 122 (2008).

Amendments After Verdicts or Judgment

No right to amend after judgment.

Once judgment on the pleadings was entered in favor of the owner of a car on the personal injury claims of a driver injured in a collision that involved the owner's car while it was being driven by another person, the driver could not amend the complaint to add additional claims against the owner. *Fredrick v. Hinkle*, 297 Ga. App. 101, 676 S.E.2d 415 (2009).

Trial court did not abuse the court's discretion in dismissing a parent's third amended petition for mandamus, which was filed after judgment had been entered, because the plaintiff did not obtain leave of the court to amend the complaint, and the defendant expressly opposed all post-judgment filings. *R.A.F. v. Robinson*, 286 Ga. 644, 690 S.E.2d 372 (2010).

Amended answer stricken after ruling by appellate court. — As an appellate court's prior ruling was determinative of all claims, the trial court did not err in striking appellants' amended answer raising, for the first time, a statute of limitations defense. *Falanga v. Kirschner & Venker, P.C.*, 298 Ga. App. 672, 680 S.E.2d 419 (2009).

Amendments to Conform to Evidence

Application of subsection (b).

Guardian of the property testified that the guardian was in court to explain to the court what the documentation in the court file showed had occurred, to explain further with some facts that were not in the file, and to respond to the answer of the guardian ad litem; the guardian testified about the grounds for the guardian's revocation, later considered by the court in its revocation order, and it followed that the guardian expressly or by implication consented to the consideration of those grounds in the order revoking the guardian's letters. In *re Longino*, 281 Ga. App. 599, 636 S.E.2d 683 (2006), cert. denied, 2007 Ga. LEXIS 92 (Ga. 2007).

Beneficiaries of a will sued the decedent's grandchild for conversion of stock the beneficiaries alleged was intended to be part of the decedent's estate. The grandchild's claim that fraud had not been pled or proven was unavailing, as the trial court amended the pleadings under O.C.G.A. § 9-11-15(b) to conform to the evidence and charged the jury on fraud; and the jury found by special verdict that the grandchild, with intent to commit fraud, converted the stock. *Bunch v. Byington*, 292 Ga. App. 497, 664 S.E.2d 842 (2008).

Evidence received without objection amends pleadings by operation of law.

Trial court did not err by granting the former husband reimbursement of pension benefits despite the former husband's failure to request that relief in the pleadings; pursuant to O.C.G.A. § 9-11-15(b), the issue was treated as if it had been raised because the former wife permitted the issue to be litigated without objection. *Howington v. Howington*, 281 Ga. 242, 637 S.E.2d 389 (2006).

Consent not implied absent indication of new issue.

Trial court did not err by prohibiting a former insurance agent from presenting to the jury a claim of slander per se with respect to statements made by a competing insurance agent in front of the former insurance agent's home and before the former insurance agent's spouse as the

complaint did not claim as a separate basis for recovery the statements made at the house, rather, it only addressed statements purportedly made to customers. Thus, the trial court was authorized to find that the issue was not tried by the implied consent of the parties since the competing insurance agent had no notice of such allegations and, therefore, the trial court did not abuse the court's discretion by disallowing the statements from being presented to the jury a separate claim of slander per se. *Am. Southern Ins. Group, Inc. v. Goldstein*, 291 Ga. App. 1, 660 S.E.2d 810 (2008), cert. denied, 2008 Ga. LEXIS 680 (Ga. 2008).

Probate proceedings. — Despite an administrator's claim that the probate court's order did not conform to the issues pleaded, and specifically, that the court erred in resolving conflicting claims to alleged property of the estate and ordering reimbursement: (1) the probate court did not resolve conflicting claims to alleged property of the estate; (2) the administrator impliedly consented to adjudicating the issues; and (3) as the question of the legitimacy of the transactions was properly before the court, it did not err in addressing it or in granting the relief necessary to protect the estate. *Ray v. Nat'l Health Investors, Inc.*, 280 Ga. App. 44, 633 S.E.2d 388 (2006).

In absence of transcript, etc.

Father failed to show reversible error because, although the father argued that the trial court's order improperly modified the father's custodial rights since there were no pleadings or motions pending in the action that would allow modification of the custodial rights, without a transcript, the court of appeals had no information about how the issue was treated at trial, and the issue could have been tried by express or implied consent of the parties. *Johnson v. Ware*, 313 Ga. App. 774, 723 S.E.2d 18 (2012).

Amendment after commencement of trial. — Trial court did not err by granting a builder leave to file an amended complaint that included a claim for attorney fees after the commencement of the trial because homeowners could not show that the homeowners were prejudiced by the filing of the amended com-

plaint of which the homeowners had prior notice and to which the homeowners had already consented; while the builder was required to obtain leave of court because the pleading had not been filed prior to the commencement of trial, under O.C.G.A. § 9-11-15(a), leave was to be freely given when justice so required. *Harris v. Tutt*, 306 Ga. App. 377, 702 S.E.2d 707 (2010).

Relation Back of Amendments

1. In General

Effect on running of limitations.

A motor carrier's motion for permission to file a permissive counterclaim against a shipping broker in a federal action did not satisfy the 18-month statute of limitations in 49 U.S.C. § 14705(a) for bringing a state action against the broker as the motion for leave to file the counterclaim had been denied in the federal action and the notice required under O.C.G.A. § 9-11-15(c) was notice of the institution of the action (i.e., notice of the lawsuit itself) and not merely notice of the incidents giving rise to such action. *Exel Transp. Servs. v. Sigma Vita, Inc.*, 288 Ga. App. 527, 654 S.E.2d 665 (2007).

Action against former land manager. — A claim by a partnership against its former managing partner related back because the claim arose from the same conduct on which the original action was based. *Cochran Mill Assocs. v. Stephens*, 286 Ga. App. 241, 648 S.E.2d 764 (2007).

Defect in answer cured.

In a tort action, venue over a defendant was assessed based upon the facts existing at the time the action was originally filed because the defendant was added as a party to a lawsuit under the relation back provision of O.C.G.A. § 9-11-15(c). Thus, venue under O.C.G.A. § 14-2-510 was proper based on the defendant's having had an office and transacted business in the county at the time the suit was originally filed. *HD Supply, Inc. v. Garger*, 299 Ga. App. 751, 683 S.E.2d 671 (2009).

Amendment related back to answer. — Seller's answer was timely and legally sufficient because the seller, which was a corporation, filed an amended answer by and through an attorney of record before the entry of a pre-trial order. There-

fore, the amended answer related back to the filing of the seller's answer pursuant to O.C.G.A. § 9-11-15(c). *Murray v. DeKalb Farmers Mkt., Inc.*, 305 Ga. App. 523, 699 S.E.2d 842 (2010).

Implicit approval to amendment to complaint's requested amount of damages. — Although a condominium association's own documents, including an account ledger, the complaint, and a motion for summary judgment, all showed different amounts due to the association from an owner, there was no issue of fact. The trial court's grant of the association's motion for summary judgment seeking damages which accrued after the date the association's complaint was filed implicitly approved an amendment to the complaint under O.C.G.A. § 9-11-15(b). *Ellington v. Gallery Condo. Ass'n*, 313 Ga. App. 424, 721 S.E.2d 631 (2011).

2. Amendments Changing or Adding Parties

Requirements for adding party by amendment not satisfied.

In a worker's personal injury suit, the trial court properly denied the worker's motion to add a franchisor as a defendant under O.C.G.A. § 9-11-15(c). The franchisor had not received timely notice of the lawsuit, and the mere fact that the franchisor was a subsidiary of a defendant corporation was insufficient, in and of itself, to impute the corporation's notice of the lawsuit to the franchisor. *Matson v. Noble Inv. Group, LLC*, 288 Ga. App. 650, 655 S.E.2d 275 (2007).

Parking lot owner was entitled to dismissal of a plaintiff's negligence action because the amended complaint adding the owner as a defendant did not relate back under O.C.G.A. § 9-11-15(c) and, thus, was barred by the statute of limitations because the mere fact that the owner's attorney worked in the same firm as the original defendants' attorney did not impute knowledge of the lawsuit to the owner. *LAZ Parking/Georgia, Inc. v. Jones*, 294 Ga. App. 122, 668 S.E.2d 547 (2008).

Trial court did not err in denying a motion to substitute parties made by plaintiffs in their negligence suit against a defendant for fire damage because the

plaintiffs had known of the existence and potential liability of the corporation the plaintiffs sought to add as a party for more than five years, and the statute of limitations had run. *Barrs v. Acree*, 302 Ga. App. 521, 691 S.E.2d 575 (2010).

Addition of new party not allowed when statute of limitations has run.

Because a belated claim filed against an alleged homebuilder's partner did not relate back to the date of the original complaint, as required by O.C.G.A. § 9-11-15(c), summary judgment in favor of the homebuilder was correctly granted, based on the expiration of the six-year limitation period under O.C.G.A. § 9-3-24. *Wallick v. Lamb*, 289 Ga. App. 25, 656 S.E.2d 164 (2007).

Addition of party authorized.

Because an administratrix amended a wrongful death complaint to reflect that such was filed in both a capacity as the administratrix of the decedent's estate and as next friend of the decedent's minor children, and there was a direct connection between the old and new parties, the complaint, as amended, related back to the original complaint; further, because the record showed that the decedent's children reached their majority after the complaint was filed, the trial court did not err in adding them as real parties in interest. *Rockdale Health Sys. v. Holder*, 280 Ga. App. 298, 640 S.E.2d 52 (2006).

Trial court did not err in finding that the relation-back statute, O.C.G.A. § 9-11-15(c), applied and that the amendment to a corporation's complaint adding the corporation's president and the president's spouse related back to the brokers' original filing of the lawsuit because all of

the relevant claims in the case arose out of the same facts, conduct, transaction, or occurrence pursuant to O.C.G.A. § 9-11-15(c); the brokers' original complaint, the corporation's counterclaim, and the corporation's amended complaint against both the brokers and the president and the spouse all asserted claims that arose directly from an alleged oral agreement and the subsequent written broker agreement between the corporation and the brokers. *Cartwright v. Fuji Photo Film U.S.A., Inc.*, 312 Ga. App. 890, 720 S.E.2d 200 (2011), cert. denied, 2012 Ga. LEXIS 306 (Ga. 2012).

Supplemental Pleadings

New theory of recovery. — Trial court did not err in entering summary judgment in favor of a grantor's grandsons in an action filed by the grantor's wife, daughter, and granddaughter challenging the validity of a quitclaim deed because res judicata compelled summary judgment on the counts alleging cloud on title, undue influence, and mistake of fact since there was an identity of the parties, a decision of the court of appeals in a prior appeal upholding the trial court's grant of summary judgment constituted an adjudication on the merits, and the causes of action raised in the amended complaint were matters put in issue or which under the rules of law could have been put in issue in the original complaint; restyling the complaint in terms of a theory of recovery ascertainable in the original case will not revive a cause of action that was defeated on appeal from a summary judgment ruling. *Smith v. Lockridge*, 288 Ga. 180, 702 S.E.2d 858 (2010).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 19B Am. Jur. Pleading and Practice Forms, Pleading, §§ 224, 283.

9-11-16. Pretrial procedure; formulating issues; order; calendar.

Law reviews. — For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
ISSUES

General Consideration

Withdrawal or amendment of admissions.

Trial court did not err in allowing the withdrawal of admissions made by operation of law pursuant to O.C.G.A. § 9-11-36(b) because O.C.G.A. § 9-11-16(b), governing pretrial orders, did not apply to limit the trial court's discretion to permit withdrawal of the disputed admissions where the trial court's June 5 scheduling order was not intended as a pretrial order. *Velasco v. Chambless*, 295 Ga. App. 376, 671 S.E.2d 870 (2008).

Objection to expert witnesses not timely filed. — In a tenant's action against the leasing agent of the tenant's apartment complex alleging that the tenant was injured by soot emitted from the apartment's heating system, the trial court properly refused to exclude expert opinions on behalf of the tenant on the ground that the opinions were inadmissible under O.C.G.A. § 24-9-67.1; although the agent had notice that the tenant intended to rely on the experts' opinions, it did not assert its claim until the last business day before the trial and therefore failed to seek a timely ruling no later than the final pretrial conference contemplated under O.C.G.A. § 9-11-16 as required by O.C.G.A. § 24-9-67.1(d). *Ambling Mgmt. Co. v. Purdy*, 283 Ga. App. 21, 640 S.E.2d 620 (2006).

Cited in *Bailey v. Edmundson*, 280 Ga. 528, 630 S.E.2d 396 (2006); *McKesson*

Corp. v. Green, 286 Ga. App. 110, 648 S.E.2d 457 (2007); *Ford Motor Co. v. Gibson*, 283 Ga. 398, 659 S.E.2d 346 (2008).

Issues

Pretrial order did not preclude bad faith recovery. — Jury was properly charged on bad faith as an avenue for attorney fees pursuant to O.C.G.A. § 13-6-11 as a pretrial order did not exclude bad faith as an avenue of recovery; the trial court did not err in charging the jury that it could award attorney fees if the defendants had acted in bad faith, had been stubbornly litigious, or had caused the client unnecessary trouble and expense. As the trial court did not err in charging on bad faith, the trial court did not compound the error or commit reversible error by charging the jury that "where a jury (was) authorized to find fraud, it (was) authorized to find bad faith." *Gerschick v. Pounds*, 281 Ga. App. 531, 636 S.E.2d 663 (2006), cert. denied, 2007 Ga. LEXIS 95 (Ga. 2007).

Addition of claim not an abuse of trial court's discretion. — In a breach of contract suit involving a construction contract, the trial court did not abuse its discretion by allowing a modification of a pretrial order to include a theory of recovery for negligent construction because the order was subject to modification to conform to the evidence that was admitted. *Fields Bros. Gen. Contrs., Inc. v. Ruecksties*, 288 Ga. App. 674, 655 S.E.2d 282 (2007).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 20A Am. Jur. Pleading and

Practice Forms, Pretrial Conference and Procedure, § 3.

ARTICLE 4

PARTIES

9-11-17. Parties plaintiff and defendant; capacity.

Law reviews. — For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005). For survey article on

appellate practice and procedure, see 60 Mercer L. Rev. 21 (2008).

JUDICIAL DECISIONS**ANALYSIS**

GENERAL CONSIDERATION

REAL PARTY IN INTEREST

INFANTS OR INCOMPETENT PERSONS

General Consideration

Plaintiff properly allowed to remain party despite its dissolution at time suit filed. — The court of appeals of Georgia found no merit to the appealing accountants' claim that the trial court erred when it allowed one of its clients to remain as a party to the litigation because it had been administratively dissolved at the time it filed suit against the accountants, as: (1) the accountants never moved to dismiss that client as a party plaintiff; (2) any issue as to their presence in the suit was not preserved for review; and (3) even if the claim was preserved, the trial court properly concluded that the Florida corporation's reinstatement related back to the time of its dissolution *nunc pro tunc*. *Fowler v. Atlanta Napp Dedy, Inc.*, 283 Ga. App. 331, 641 S.E.2d 573 (2007).

Cited in *Blair v. Bishop*, 290 Ga. App. 721, 660 S.E.2d 35 (2008); *Powers v. CDSaxton Props., LLC*, 285 Ga. 303, 676 S.E.2d 186 (2009); *In the Interest of W. L. H.*, 314 Ga. App. 185, 723 S.E.2d 478 (2012).

Real Party in Interest**Failure to establish.**

Spouse's claim that the spouse had standing as a real party in interest to bring a nuisance claim because the spouse shared an equitable interest in a mobile home park on the damaged property based on the improvements and repairs the spouse had made to it during the time

the spouse had been married to the plaintiff was rejected as no property rights were created in the assets of the marriage while the parties were still married and a trial court's ability to determine the equitable interests of spouses in real property was based on the ancillary jurisdiction it specifically maintained in divorce actions. *Reidling v. City of Gainesville*, 280 Ga. App. 698, 634 S.E.2d 862 (2006).

Plaintiffs, purported members of a church's board of directors, filed suit to terminate the pastor's employment. As plaintiffs had five months' notice from the trial court that the plaintiffs had the burden to prove that the plaintiffs had the capacity to bring the suit, the plaintiffs suit was properly dismissed when the plaintiffs failed to meet the plaintiffs' burden. *Victory Drive Deliverance Temple, Inc. v. Jackson*, 298 Ga. App. 563, 680 S.E.2d 588 (2009).

Trial court erred in granting an assignee summary judgment in an action against a debtor to collect the amount owed on a credit card account agreement the debtor allegedly entered into with an assignor because the assignee failed to show that it was entitled to file suit to recover the outstanding debt against the debtor pursuant to O.C.G.A. § 9-11-17(a); the assignee relied on the affidavit of its agent and business records custodian of its credit card accounts to show that the assignor transferred to it all rights and interests to the debtor's account, but the affidavit failed to refer to or attach any

written agreements that could complete the chain of assignment from the assignor to the assignee, and although the assignee contended that the debtor did not raise its failure to present a valid assignment in the trial court, the record reflected that that issue was squarely before the trial court because the assignee directly addressed the debtor's defense under § 9-11-17 in its motion for summary judgment, referring to the affidavit to show that it was the assignee. *Wirth v. Cach, LLC*, 300 Ga. App. 488, 685 S.E.2d 433 (2009).

Assignment not established. — Trial court erred in dismissing an employee's breach of contract complaint against an employer on the ground that the employee was not a real party in interest under O.C.G.A. § 9-11-17(a) because there was no showing that the employee assigned the employee's right, title, and interest in the parties' employment contract to a limited liability company (LLC); the employee assigned payment under the agreement to the LLC but did not assign the employee's right, title, and interest under the employment agreement, and for the contract to be enforced by the LLC, the assignment would have to be in writing. *Phillips v. Selecto Sci.*, 308 Ga. App. 412, 707 S.E.2d 615 (2011).

Receiver of a bank in receivership was the real party in interest under O.C.G.A. § 9-11-17(a) to enforce a bond insuring misconduct by the bank's employees, even though the bond was issued in the name of a bankruptcy debtor which was the parent company of the bank, since the bankruptcy trustee did not allege any harm to the debtor from the alleged misconduct of bank employees, and the bond was properly reformed to add the bank as an intended named insured. *Lubin v. Cincinnati Ins. Co.*, No. 1:09-CV-2985-RWS, 2010 U.S. Dist. LEXIS 133794 (N.D. Ga. Dec. 17, 2010).

Subsection (a) precludes dismissal until reasonable time is allowed, etc.

Appellees' claim that the administrator of the estate of a property owner's mother, as legal title holder to the devised property at the time a suit challenging the grant of a special exception was filed, was the proper party to bring the action was

waived as the appellees did not move to dismiss the action on the ground, and no action was to be dismissed on the ground that it was not prosecuted in the name of the real party in interest until a reasonable time had been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. *Hollberg v. Spalding County*, 281 Ga. App. 768, 637 S.E.2d 163 (2006).

Summary judgment improper.

Because the trial court's order was best viewed as an order dismissing the plaintiffs' complaint for failure to comply with the requirements of O.C.G.A. § 9-11-17, and summary judgment could not properly be granted to a defendant on the basis of a real-party-in-interest objection, absent any evidence that an exception to the final judgment rule applied, the appeal from the trial court's order had to be dismissed. *First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc.*, 282 Ga. 883, 655 S.E.2d 605 (2008).

Although an estate's malpractice action was not initially brought by the real party in interest — the estate's administrator — the administrator was timely substituted as the plaintiff in the action by amendment which, under O.C.G.A. § 9-11-17(a), had the same effect as if the action had been commenced by the real party in interest. Thus, the suit was not time-barred by O.C.G.A. § 9-3-71(b)'s five-year repose period, and a doctor and the health care facilities were not entitled to summary judgment. *Memar v. Styblo*, 293 Ga. App. 528, 667 S.E.2d 388 (2008).

Pursuant to the condominium declaration, a condominium association lacked standing to sue defendants for damages based on defects in the construction of common areas of the condominium. But under O.C.G.A. § 9-11-17(a), the trial court erred by granting the defendants summary judgment before considering the association's motion to substitute the individual condominium unit owners as real parties in interest. *Phoenix on Peachtree Condo. Ass'n v. Phoenix on Peachtree, LLC*, 294 Ga. App. 447, 669 S.E.2d 229 (2008).

Subsequently-named corporation lacked standing to appeal from orders

against the previously-named corporation, as that corporation was not a party to the litigation, was not granted or denied intervention pursuant to a motion to amend with leave of court, and an attempted substitution by the predecessor was more than an attempt to correct a misnomer. *Degussa Wall Sys. v. Sharp*, 286 Ga. App. 349, 648 S.E.2d 687 (2007), cert. denied, 2007 Ga. LEXIS 701 (Ga. 2007).

Proper plaintiff is new property owner who became “grantor”. — Former property owner lacked standing to bring an action for statutory damages and attorney fees under O.C.G.A. § 44-14-3(c) against a lender that failed to cancel its security deed on the property after receiving a payoff of the loan as the owner no longer had an interest in the property at the time that the complaint was filed and, accordingly, the owner was not the real party in interest under O.C.G.A. § 9-11-17(a); the new purchaser of the property became “the grantor” that had the capacity to prosecute the claim pursuant to O.C.G.A. § 44-14-3(a)(4). *Associated Credit Union v. Pinto*, 297 Ga. App. 605, 677 S.E.2d 789 (2009).

Time limit to amend complaint to name real party in interest. — Decedent’s sibling, as the purported representative of the decedent’s spouse, filed a

wrongful death suit against medical providers within five years of the alleged negligent acts and, within a reasonable time after the providers objected to the sibling’s standing, filed a motion to amend the complaint to name the decedent’s spouse as the real party in interest. As the proposed amendment did not “initiate” a new claim, the medical malpractice statute of repose, O.C.G.A. § 9-3-71(b), did not prevent amendment of the complaint even though the motion to amend was filed more than five years after the alleged negligence. *Rooks v. Tenet Health Sys. GB, Inc.*, 292 Ga. App. 477, 664 S.E.2d 861 (2008).

Infants or Incompetent Persons

Guardian ad litem appointed for parent. — Juvenile court did not err by sua sponte evaluating a parent’s competency in a termination of parental rights proceeding as another court had already found the parent mentally incompetent and the parent’s rights were terminated based upon findings independent of that mental competency; thus, no harm was shown by the juvenile court’s failure to hold a competency hearing. As a safeguard, the juvenile court appointed a guardian ad litem for the parent. In the *Interest of N. S. E.*, 293 Ga. App. 171, 666 S.E.2d 587 (2008).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 13 Am. Jur. Pleading and Practice Forms, Guardian, § 478. 19 Am. Jur.

Pleading and Practice Forms, Parties, § 4.

9-11-18. Joinder of claims and remedies.

JUDICIAL DECISIONS

Cited in *Walker v. Walker*, 293 Ga. App. 872, 668 S.E.2d 330 (2008).

9-11-19. Joinder of persons needed for just adjudication.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

REQUESTS FOR AND OBJECTIONS TO JOINDER

INDISPENSABILITY

1. IN GENERAL

2. INDISPENSABLE PARTIES

JOINDER WARRANTED

General Consideration**Failure to join necessary parties.** —

Although a great aunt and great step-uncle claimed that the trial court failed to join necessary parties in a custody case, the record failed to reveal that this issue was properly presented to the trial court; therefore, this defense was waived. *Wiepert v. Stover*, 298 Ga. App. 683, 680 S.E.2d 707 (2009).

Failure to consider factors of O.C.G.A. § 9-11-19(b). — Trial court erred in dismissing a customer's action against an organization on the ground that the customer failed to join a corporation as a party because the order did not show that the trial court considered the factors listed in O.C.G.A. § 9-11-19(b), and the corporation was doing business in the state sufficient to confer jurisdiction under O.C.G.A. § 9-10-91(1). *Wright v. Safari Club Int'l*, 307 Ga. App. 136, 706 S.E.2d 84 (2010).

Owners not indispensable parties in rezoning case. — Owners of property that was being rezoned were not indispensable parties under O.C.G.A. § 9-11-19. The owners were selling the property to the rezoning applicants, who were parties; thus, the case could be decided on the merits without prejudicing the rights of the owners. *Stendahl v. Cobb County*, 284 Ga. 525, 668 S.E.2d 723 (2008).

Cited in *Marwede v. EQR/Lincoln L.P.*, 284 Ga. App. 404, 643 S.E.2d 766 (2007); *U. S. A. Gas, Inc. v. Whitfield County*, 298 Ga. App. 851, 681 S.E.2d 658 (2009); *Bishop v. Patton*, 288 Ga. 600, 706 S.E.2d 634 (2011).

Requests for and Objections to Joinder**Defendant's duty to request joinder.**

Despite the claim by the owners of a corporation that the trial court erred in refusing to allow them to intervene in the case as the true owners of the property in

question, because the owners never properly filed or asserted a motion to intervene, no error resulted; moreover, their argument that the trial court erred in refusing to allow them to file their motion to intervene also provided no basis for relief. *Rice v. Champion Bldgs., Inc.*, 288 Ga. App. 597, 654 S.E.2d 390 (2007), cert. denied, 2008 Ga. LEXIS 326 (Ga. 2008).

Joinder not required. — Trial court did not err in denying a motion for joinder in that, to the extent that the addition of the principals of a real estate developer to the movant's counterclaim was sought because they were joint tortfeasors with the developer, no joinder was required. *Chaney v. Harrison & Lynam, LLC*, 308 Ga. App. 808, 708 S.E.2d 672 (2011).

Indispensability**1. In General**

Appellate court, upon remand, ordered trial court to address indispensability of party in motion to dismiss. — Although dismissal of a complaint was reversed on appeal, because the appeals court was unable to determine whether the trial court had considered the remaining ground of the motion to dismiss for failure to join an indispensable party, the trial court was ordered on remand to make the appropriate findings, if any, with regard to that ground. *OFC Capital v. Schmidlein Elec., Inc.*, 289 Ga. App. 143, 656 S.E.2d 272 (2008).

2. Indispensable Parties**Joint tortfeasors, etc.**

Plaintiff sued a billboard company for fraud; the plaintiff's motion to join the company's president under O.C.G.A. § 9-11-19(a)(1)(A) was properly denied. If, as the plaintiff alleged, the president acted fraudulently, the president could, at most, be held liable as a joint tortfeasor with the company and thus was not an indispensable party. *Merritt v. Marlin Outdoor Adver., LTD.*, 298 Ga. App. 87, 679 S.E.2d 97 (2009).

In a dispute between adjoining landowners over title to approximately six acres of land, the trial court properly denied the adjoining neighbors' motion to implead additional third parties, and motion to add those parties as indispensable third parties under O.C.G.A. § 9-11-19(a), because those individuals had no legal interest in the disputed property at the time the neighbors sought to add them. *Pirkle v. Turner*, 281 Ga. 846, 642 S.E.2d 849 (2007).

County indispensable party in case claiming improper abandonment of public road because only county had standing to challenge claim. — Because a landowner dismissed all the claims alleged against a county, a claim that the county improperly abandoned a public road due to the county's failure to comply with O.C.G.A. § 32-7-4 had also been relinquished. Moreover, pursuant to O.C.G.A. § 9-11-19, the trial court properly recognized that this issue could not be justly adjudicated without the county's participation as a party because only the

county had standing to challenge the landowner's claim that the road was a public road. *McRae v. SSI Dev., LLC*, 283 Ga. 92, 656 S.E.2d 138 (2008).

Joinder Warranted

Joint obligors.

An attorney could not be held solely liable to a court reporting service for \$851.10, representing court reporting fees owed, as the clients the attorney was representing at the time the services were rendered should have been joined in the litigation, pursuant to both O.C.G.A. § 9-11-14(a) and O.C.G.A. § 9-11-19(a), given that: (1) the clients could have been liable to the attorney for all or part of the court reporting fees; and (2) the attorney's claim that the clients made partial payment for the court reporting services also rendered the clients necessary parties for adjudication of this dispute. *Free v. Lankford & Assocs., Inc.*, 284 Ga. App. 328, 643 S.E.2d 771 (2007), cert. denied, 2007 Ga. LEXIS 560 (Ga. 2007).

9-11-20. Permissive joinder of parties.

JUDICIAL DECISIONS

Joinder of claims arising out of "similar" transactions not authorized.

Because the numerous claims involving the various plaintiffs did not arise out of the same transaction, occurrence, or series of transactions or occurrences, but the claims were merely similar, involving common questions of law and fact, and thus could have been consolidated in accordance with O.C.G.A. § 9-11-42(a), the trial court erred in denying defendants' motion to sever said claims. *Lincoln Elec. Co. v. Gaither*, 286 Ga. App. 558, 649 S.E.2d 823 (2007).

Fraudulent misjoinder did not occur. — In a removed action seeking a

declaration by former distributors as to the enforceability of non-compete and non-solicitation provisions in their respective distributorship agreements, a non-diverse corporation was not fraudulently misjoined under Fed. R. Civ. P. 20 or O.C.G.A. § 9-11-20(a), warranting a remand pursuant to 28 U.S.C. § 1447, because the court could not say with certainty that its claims did not arise out of the same series of transactions. *Campbell v. Quixtar, Inc.*, No. 2:08-CV-0045-RWS, 2008 U.S. Dist. LEXIS 46507 (N.D. Ga. June 13, 2008).

Cited in *Marwede v. EQR/Lincoln L.P.*, 284 Ga. App. 404, 643 S.E.2d 766 (2007).

9-11-21. Misjoinder and nonjoinder of parties.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
ADDING OR DROPPING PARTIES

General Consideration

Discretion to realign parties.

Trial court did not err under O.C.G.A. § 9-11-21 in realigning the parties to cause the husband, who initially filed the divorce action, to be the defendant and to cause the wife to be the plaintiff; the wife's burden of proof was significantly heavier than the husband's, as the wife had the burden on a claim of fraudulent transfers and on requests for alimony, adultery, and attorney's fees, so the wife was entitled to the procedural rights of a plaintiff, such as those rights to opening and closing statements granted under O.C.G.A. § 9-10-186. *Moore v. Moore*, 281 Ga. 81, 635 S.E.2d 107 (2006).

Adding or Dropping Parties

Section 9-11-15(a) in pari materia with this section.

In a personal injury action, and by reading O.C.G.A. § 9-11-15(a) in pari materia with O.C.G.A. § 9-11-21, because a plaintiff sued two parties, but substituted only one, the partnership originally sued was not required to file an answer absent an order from the court to do so, and hence could not be found in default; as a result, the trial court correctly found a proper case was made for the default to be opened. *Marwede v. EQR/Lincoln L.P.*, 284 Ga. App. 404, 643 S.E.2d 766 (2007), cert. denied, 2007 Ga. LEXIS 504 (Ga. 2007).

Subsequently-named corporation lacked standing to appeal from orders against the previously-named corporation as that corporation was not a party to the litigation, was not granted or denied intervention pursuant to a motion to amend with leave of court, and an attempted substitution by the predecessor was more than an attempt to correct a misnomer. *Degussa Wall Sys. v. Sharp*, 286 Ga. App. 349, 648 S.E.2d 687 (2007), cert. denied, 2007 Ga. LEXIS 701 (Ga. 2007).

Section inapplicable when substitutions named defendant for "John

Doe."

Although a borrower failed to obtain the state court's leave before filing a third amended complaint, as required by O.C.G.A. § 9-11-21, the amended complaint was not ineffective to add a non-diverse attorney and law firm, and the federal district court was able to consider the attorney and law firm in determining the existence of diversity jurisdiction for purposes of the borrower's motion for remand under 28 U.S.C. § 1447; because the attorney and law firm were substituted for John Does named in the original complaint, O.C.G.A. § 9-11-21 did not apply; rather, O.C.G.A. § 9-11-15(c), which allowed for the substitution by amendment of a John Doe without the state court's leave applied. *Peachtree/Stratford, L.P. v. Phoenix Home Life Ins. Co.*, No. 1:06-CV-0514-RWS, 2006 U.S. Dist. LEXIS 28840 (N.D. Ga. May 2, 2006).

Addition of party or change of status must be by leave of court.

Marketing network properly removed the distributors' action under 28 U.S.C. §§ 1332 and 1441 because the case was not removable until a first amended complaint was filed adding substantially different claims and causing the likely amount in controversy to surpass the jurisdictional amount. Thus, removal was timely under 28 U.S.C. § 1446(b), and the adding of a non-diverse distributor as plaintiff was improper without a court order pursuant to O.C.G.A. §§ 9-11-15 and 9-11-21, making the matter completely diverse. *Campbell v. Quixtar, Inc.*, No. 2:08-CV-0044-RWS, 2008 U.S. Dist. LEXIS 46567 (N.D. Ga. June 13, 2008).

Because the claimants never sought leave of court to add a former county commissioner as a party in the commissioner's individual capacity, any unilateral attempt by the claimants to amend the claimants' complaint in this regard through allegations in an appellate brief was ineffective under O.C.G.A. §§ 9-11-15 and 9-11-21. *Board of Comm'rs v. Johnson*, 311 Ga. App. 867, 717 S.E.2d 272 (2011).

Trial court properly dismissed certain parties because no motion was filed pursuant to O.C.G.A. §§ 9-11-15 and 9-11-21 to add the parties and no leave of court was granted to add the parties. *Odion v. Varon*, 312 Ga. App. 242, 718 S.E.2d 23 (2011).

Addition of party not authorized.

In an action for declaratory judgment filed by co-administrators and another against an individual who made a claim against an estate, the co-administrators' motion to add three new defendants was properly denied. Granting the motion would result in prejudice to the potential new defendants, who were not related to the individual and who had no reason to know that they would be brought in as parties to the action; moreover, the co-administrators had been aware of the three and the potential claims against them for many months. *Ellison v. Hill*, 288 Ga. App. 415, 654 S.E.2d 158 (2007), cert. denied, 2008 Ga. LEXIS 282 (Ga. 2008).

In a suit by appellants, a company and the company's president, against a law firm, the trial court properly denied a motion to add a partner as a party defendant under O.C.G.A. §§ 9-11-15(c) and 9-11-21 when appellants claimed that the partner had violated the attorney-client privilege. Appellants did not assert that the partner ever personally represented the appellants or any related entities; accordingly, any attorney-privilege implicated in the fax would be that between appellants and the law firm, and not between appellants and the partner individ-

ually. *Smith v. Morris, Manning & Martin, LLP*, 293 Ga. App. 153, 666 S.E.2d 683 (2008).

Trial court did not abuse the court's discretion by denying a plaintiff's motion for leave to amend the complaint to substitute parties under O.C.G.A. § 9-11-21 as the plaintiff did not offer an acceptable excuse or justification for failing to name the proper parties that would warrant the conclusion that the trial court ruled inappropriately. *Riding v. Ellis*, 297 Ga. App. 740, 678 S.E.2d 178 (2009).

Trial court did not err in denying a motion to substitute parties made by plaintiffs in their negligence suit against a defendant for fire damage because the plaintiffs had known of the existence and potential liability of the corporation the plaintiffs sought to add as a party for more than five years, and the statute of limitations had run. *Barrs v. Acree*, 302 Ga. App. 521, 691 S.E.2d 575 (2010).

Filing of duplicate complaint not an amendment adding a party. — Trial court erred in concluding that the filing of a duplicate complaint was an amendment to add a new party requiring the purchaser to file a motion under the Georgia Civil Practice Act, O.C.G.A. § 9-11-21, because the filing was not an amendment adding the home inspector as a party to the lawsuit; the inspector was named a defendant in the original filing and, at most, the duplicate filing was a vehicle for obtaining a summons for the home inspector. *Strickland v. Leake*, 311 Ga. App. 298, 715 S.E.2d 676 (2011).

9-11-22. Interpleader.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Motion for judgment on pleadings properly treated as motion for summary judgment. — In an interpleader action involving a dispute over the payment of health insurance benefits, the trial court properly granted the hospital's motion for a judgment on the pleadings as

there was no genuine issue of fact that the hospital was owed the amount for the medical expenses at issue and the trial court found that a purported settlement agreement between the employee's counsel and the hospital for less than the full amount was unenforceable as it lacked consideration. The employee agreed to

waive oral argument on all motions pending before the trial court and, therefore, acquiesced in the trial court's procedure of treating the hospital's motion for judgment on the pleadings as one for summary judgment, therefore, the trial court did

not err in treating the hospital's motion as such without providing formal notice or in failing to hold a hearing on that motion. *Lamb v. Fulton-DeKalb Hosp. Auth.*, 297 Ga. App. 529, 677 S.E.2d 328 (2009).

9-11-23. Class actions.

Law reviews. — For article, "Class Actions," see 56 *Mercer L. Rev.* 1219 (2005). For annual survey of class action law, see 57 *Mercer L. Rev.* 1031 (2006). For survey article on trial practice and procedure, see 60 *Mercer L. Rev.* 397 (2008). For

annual survey on insurance, see 61 *Mercer L. Rev.* 179 (2009). For annual survey of law on class actions, see 61 *Mercer L. Rev.* 1015 (2010). For annual survey of law on trial practice and procedure, see 62 *Mercer L. Rev.* 339 (2010).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
REPRESENTATION AND CERTIFICATION
DISMISSAL OR COMPROMISE

General Consideration

Construed with other statutes. — Fact that class actions were authorized for identity fraud claims under O.C.G.A. § 16-9-130(a) did not obviate the need to comply with the requirements of O.C.G.A. § 9-11-23(b), such that class certification was properly denied in a former employee's suit alleging identity fraud and other matters due to the former employer's submission of subagent license applications without employee authorization; individualized issues regarding employee signatures and authorizations predominated over common issues. *Perez v. Atlanta Check Cashers, Inc.*, 302 Ga. App. 864, 692 S.E.2d 670 (2010).

Applicability to federal Class Action Fairness Act of 2005. — Remand was required because a customer sought certification under O.C.G.A. § 9-11-23(b)(2) of a class of Georgia customers of a bank that purchased benefits for which the customers were ineligible. Thus, the bank failed to meet its burden under the Class Action Fairness Act of 2005 and 28 U.S.C. §§ 1332(d) and 1446 to show the amount in controversy satisfied the jurisdictional requirements, and there was no other basis for jurisdiction under 28 U.S.C. § 1453. *Thomas v. Bank*

of Am. Corp., No. 3:08-CV-68 (CDL), 2009 U.S. Dist. LEXIS 5404 (M.D. Ga. Jan. 12, 2009), *aff'd*, 570 F.3d 1280 (11th Cir. 2009).

Court's failure to specify conditions met. — Despite the fact that it appeared from the record that a group of landowners raised several issues of fact common to all to support a nuisance claim, the trial court's order of certification was vacated, as it failed to specify, either orally or in writing, whether each of the five prerequisites under O.C.G.A. § 9-11-23 was presented. *Griffin Indus., Inc. v. Green*, 280 Ga. App. 858, 635 S.E.2d 231 (2006).

Reliance on deposition excerpts in considering class certification motion proper. — In considering a motion for class certification, the trial court did not err in relying upon excerpts of deposition testimony attached to the motion; after asking the plaintiff to file the depositions, the defendant had not objected below to the plaintiff's failure to do so and had made no further effort to have them added to the record before the trial court issued the certification order, and case law specifically allowed a trial court to rely on deposition excerpts filed by a party in support of a motion. *Village Auto Ins. Co. v. Rush*, 286 Ga. App. 688, 649 S.E.2d 862

(2007), cert. denied, 2008 Ga. LEXIS 72 (Ga. 2008).

Exhaustion of administrative remedies. — In a tax refund class action under O.C.G.A. § 48-5-380, the named attorneys satisfied the administrative exhaustion requirement for an entire class of attorneys; the named attorneys acted for the entire class pursuant to former O.C.G.A. § 9-11-23 by giving the City of Atlanta notice of the tax constitutionality claim by filing administrative and civil actions, and permitting recovery only to those attorneys with the foresight to have demanded a refund was untenable in a case such as the instant one that involved a matter of constitutional import and an unconstitutional ordinance that had been relied upon to improperly collect taxes. *Barnes v. City of Atlanta*, 281 Ga. 256, 637 S.E.2d 4 (2006).

Attorney fees. — Because the delay in giving the opt-out notice in the class action tax refund case was not prohibited by former O.C.G.A. § 9-11-23 and did not prejudice the attorneys who were class members, requiring the attorneys to pay for the work of class counsel for the common benefit did not unduly burden the right to opt out. *Barnes v. City of Atlanta*, 281 Ga. 256, 637 S.E.2d 4 (2006).

Challenge to certification order untimely. — Any challenge to the trial court's certification order was barred as untimely because pursuant to O.C.G.A. § 9-11-23(g), if a private water system owner believed the order certifying the class was legally deficient, the owner had to file a separate appeal within 30 days after that order was entered; the owner could not wait until after entry of final judgment in the underlying case to raise such a challenge. *Jones v. Forest Lake Vill. Homeowners Ass'n*, 304 Ga. App. 495, 696 S.E.2d 453 (2010).

Appellate review. — As a trial court certified a class of area residents who were evacuated after an accidental chemical release upon finding that the requirements of O.C.G.A. § 9-11-23(a) and (b)(3) were satisfied, rather than based upon a letter agreement regarding certification that the parties had previously entered into, review of the agreement was not warranted on appeal. *Brenntag Mid*

South, Inc. v. Smart, 308 Ga. App. 899, 710 S.E.2d 569 (2011).

Representation and Certification

Factors as to certification.

The trial court abused the court's discretion in certifying a class without holding a hearing on a motion requesting a hearing, as the court failed to comply with O.C.G.A. § 9-11-23, requiring the court to make findings of fact and conclusions of law that the prerequisites supporting class certification were met. *McDonald Oil Co. v. Cianocchi*, 285 Ga. App. 829, 648 S.E.2d 154 (2007).

Because the trial court erred in finding that the requirements of class certification under O.C.G.A. § 9-11-23 were moot, concluding that there was no merit to the action, the finding was reversed; further, the case was remanded based on the court's failure to satisfy the specific provisions of § 9-11-23(f)(3) and due to an improper reference to a pending motion for attorney fees under O.C.G.A. § 9-15-14 and unspecified potential conflicts of interest. *Gay v. B. H. Transfer Co.*, 287 Ga. App. 610, 652 S.E.2d 200 (2007).

Common questions involved and common relief sought.

Trial court properly certified a class consisting of all similarly situated bankrupt mortgagors who had been assessed inspection and attorney fees by a mortgagee without prior notice or approval by the bankruptcy court. Common questions of law—whether the mortgagee's security agreements gave it the right to engage in the conduct at issue—predominated over individual questions, the class members were similarly situated, and their claims were typical, as the plaintiff mortgagor alleged that the mortgagee's conduct constituted breach of contract, fraud, theft, and conversion. *Liberty Lending Servs. v. Canada*, 293 Ga. App. 731, 668 S.E.2d 3 (2008).

Common facts make class certification possible.

As the trial court found on an undisputed record that every insurance policy issued by an insurer to a class of insureds in its credit insurance policies provided that the insurer would return the unearned premium if the debt was paid off

before the policy period expired, an individual insured's claim for said premiums, and the like claims of the represented class, were one and the same, and the trial court did not abuse the court's discretion in finding that the proposed class met the typicality requirement. *J.M.I.C. Life Ins. Co. v. Toole*, 280 Ga. App. 372, 634 S.E.2d 123 (2006).

Commonality requirement met. —

In an action filed under the Telephone Consumer Protection Act of 1991, specifically 47 U.S.C. § 227, where the proposed class explicitly excluded all parties with whom an advertiser had any records or knowledge of having an “established business relationship,” and in addition should the advertiser obtain records or knowledge of having an established business relationship with additional parties, the trial court explicitly noted that it retained the right to modify or amend the class; thus, the trial court did not abuse its discretion in rejecting a claim that the proposed certified class failed to satisfy the commonality requirement under O.C.G.A. § 9-11-23(a)(2). *Am. Home Servs. v. A Fast Sign Co.*, 287 Ga. App. 161, 651 S.E.2d 119 (2007), cert. denied, 2007 Ga. LEXIS 825 (Ga. 2007).

In a suit brought by various insureds, alleging that an insurance company and its related entities engaged in fraud with regard to allegedly fraudulently representing that they were being provided group medical insurance coverage, the trial court did not abuse its discretion by certifying the insureds as a class as the reliance of the insureds was based on a uniform renewal document all received, which satisfied the commonality requirement, and differing defenses that they may have did not defeat certification since common questions of law predominated. The reviewing court was satisfied that the trial court exercised its discretion in ruling that the computation of individual damages would not be so complex or fact-specific so as to bar certification. *Fortis Ins. Co. v. Kahn*, 299 Ga. App. 319, 683 S.E.2d 4 (2009), cert. denied, No. S09C1992, 2010 Ga. LEXIS 48 (Ga. 2010).

Property owners filed a class action alleging that a county had improperly recalculated property taxes without affording

taxpayers the notice required by O.C.G.A. § 48-5-306 and the opportunity to appeal as provided in O.C.G.A. § 48-5-311. Since the class of taxpayers was certified solely to consider a common procedural issue—whether the county had to provide class members with statutory notice of and the right to appeal the recalculations—the trial court properly found commonality under O.C.G.A. § 9-11-23(a)(2). *Fulton County Bd. of Tax Assessors v. Marani*, 299 Ga. App. 580, 683 S.E.2d 136 (2009), cert. denied, No. S09C2072, 2010 Ga. LEXIS 18 (Ga. 2010).

Commonality requirement not met.

The trial court did not abuse the court's discretion in determining that an alleged class representative's claims were not suitable for class certification as individual fact issues predominated over any common issues shared by the putative class. *R.S.W. v. Emory Healthcare, Inc.*, 290 Ga. App. 284, 659 S.E.2d 680 (2008).

Trial court did not err in denying a homeowner's motion for class certification in the homeowner's action seeking a declaratory judgment that adjacent lot owners had an irrevocable easement or implied covenant in a golf club's golf course and an injunction restricting the use of the property to golf course purposes only because there was evidence that a homeowner failed to show commonality, i.e., questions of law and fact common to the class members, as required by O.C.G.A. § 9-11-23(a)(2); the trial court was authorized to find that resolution of the issues would require individual determinations and an analysis of the representations made to each homeowner and the extent to which each homeowner relied upon the representations because the lots purchased by the prospective class members were not developed and sold in a single, comprehensive subdivision but arose out of multiple projects by different developers and resulted in different subdivisions with separate sections, and different realtors had been involved in the subdivision sales. *Peck v. Lanier Golf Club, Inc.*, 304 Ga. App. 868, 697 S.E.2d 922 (2010).

Trial court abused the court's discretion in granting a motion for class certification because many individual suits would be necessary even if the one or two common

issues were resolved class-wide; the qualitative analysis necessary to show liability for injuries such as loss of consortium, anxiety, and emotional distress demonstrated that common questions vital to proving causation had to be answered on a highly individualized basis, and proving causation for claims based on injuries such as anxiety, loss of consortium, and emotional distress was inherently specific to the individuals affected. *Doctors Hosp. Surgery Ctr., LP v. Webb*, 307 Ga. App. 44, 704 S.E.2d 185 (2010).

Because proof in the customers' misrepresentation action against a funeral home would require an inquiry of every class member to determine whether the members were told that an obituary fee included a logo charge and/or whether the class would have declined to include the logo if given such information, the proposed class failed to meet the commonality requirement of O.C.G.A. § 9-11-23(a)(2) for certification. *Ardis v. Fairhaven Funeral Home & Crematory, Inc.*, 312 Ga. App. 482, 718 S.E.2d 843 (2011).

Trial court erred in finding that a customer and the proposed class shared common questions of law and fact and that the customer was a sufficiently typical representative of that class under O.C.G.A. § 9-11-23(a)(2) and (a)(3) because the customer did not suffer any actual financial or physical injury as a result of a pharmacy's sale of the customer's medication information to another pharmacy; there was no evidence of any "public" disclosure of the customer's data, and such cases were bound to turn on individual rather than common questions. *Rite Aid of Ga., Inc. v. Peacock*, No. A11A2133, 2012 Ga. App. LEXIS 319 (Mar. 22, 2012).

Denial of certification where individual questions predominate.

Because individual factual issues predominated over issues common to all class members, it was error to grant class certification as to damages to customers claiming that companies had improperly provided termite inspections. The action would require individualized inquiries as to what inspectors did at particular properties, whether individual customer signatures were forged, and whether individ-

ual customers had met affirmative contractual duties; furthermore, resolution of the class representatives' claims would not necessarily prove one or more elements of the other class members' claims. *Rollins, Inc. v. Warren*, 288 Ga. App. 184, 653 S.E.2d 794 (2007), cert. denied, 2008 Ga. LEXIS 216 (Ga. 2008).

A trial court properly denied class certification requested by a plaintiff in a suit asserting breach of contract and other claims involving the purchase of a truck that was equipped with a base radiator instead of an upgrade version, because the plaintiff failed to establish even one of the factors required of O.C.G.A. § 9-11-23(f)(3) in that there were too many individual issues existing for each purported class member with regard to each purchase made. Individual issues existed as whether a purported class member actually paid for an upgraded radiator not received; whether each class member gave defendant, the manufacturer, a reasonable opportunity to repair the defect; and whether injury was caused by such a defect. *Roland v. Ford Motor Co.*, 288 Ga. App. 625, 655 S.E.2d 259 (2007), cert. denied, 2008 Ga. LEXIS 270 (Ga. 2008).

Class certification under O.C.G.A. 9-11-23(b)(3) was properly denied in a former employee's suit alleging that the former employer submitted subagent license applications without employee authorization because individual issues regarding whether employee signatures were forged and whether employee authorizations were obtained predominated over common issues. *Perez v. Atlanta Check Cashers, Inc.*, 302 Ga. App. 864, 692 S.E.2d 670 (2010).

Class member had standing to represent class. — In subscribers' class action suit against an internet access provider, one of the subscribers did not lack standing to represent the class due to the subscriber's failure to pay the provider an allegedly illegal early termination fee, which was the gravamen of the lawsuit. The provider charged the fee to the subscriber's credit card, and refused to disclaim the right to collect the fee from the subscriber. *EarthLink, Inc. v. Eaves*, 293 Ga. App. 75, 666 S.E.2d 420 (2008).

Litigants and trial court share obligation to ensure that certification question timely resolved. — Trial court erred in denying a motion for class certification because the court did not engage in the required analysis in determining whether the motion had to be denied as untimely or make any factual findings supporting the court's decision; O.C.G.A. § 9-11-23 places a shared obligation upon the litigants and the court to ensure that the question of class certification is timely resolved, and it neither directs a plaintiff to move for class certification within a specified time, nor does it prevent a defendant from requesting an order denying class certification or a court from acting on the court's own initiative. *Fuller v. Heartwood 11, LLC*, 301 Ga. App. 309, 687 S.E.2d 287 (2009); cert. denied, No. S10C0573, 2010 Ga. LEXIS 361 (Ga. 2010).

Failure to describe members of class. — Order of final judgment was vacated and a class action was remanded for entry of an order that included a description of the class members as identified in the trial court's order naming the class. The order of final judgment failed to comply with O.C.G.A. § 9-11-23(c)(3) since the order did not describe the members of the class as previously identified by the trial court in the court's order naming the class. *Jones v. Forest Lake Vill. Homeowners Ass'n*, 304 Ga. App. 495, 696 S.E.2d 453 (2010).

Failure to consider factors. — Order denying a homeowner's petition for class certification of a declaratory judgment action was improper because the trial court erred in addressing only the merits of the underlying claim and not making the required findings and conclusions with regard to whether each factor required by O.C.G.A. § 9-11-23 had been established; contrary to the trial court's order which assumed that the homeowner was traveling under § 9-11-23(b)(3), the homeowner was asking for a declaratory judgment and proceeding under § 9-11-23(b)(2). The trial court's order did not analyze all of the factors under § 9-11-23(a) and those the court did discuss were dealt with solely under the guise of the substantive claim. *Peck v. Lanier Golf Club, Inc.*, 298 Ga. App. 555, 680 S.E.2d 595 (2009).

Requirements for deciding whether motion for class certification is untimely. — When deciding whether to deny a motion for class certification as untimely, the trial court, in the exercise of the court's sound discretion, must consider the purposes served by O.C.G.A. § 9-11-23, balancing any actual prejudice to the litigants or the class against any legitimate reasons for the delay, and in the absence of a local rule governing the timely filing of a motion for class certification, a trial court may not deny an otherwise proper motion solely on the basis that the motion was untimely; rather, the trial court must determine, considering the relevant factors, whether the delay resulted in any actual prejudice to the litigants or to the class. Then, in the court's order on the motion for class certification, the trial court shall set forth in writing factual findings supporting the court's decision. *Fuller v. Heartwood 11, LLC*, 301 Ga. App. 309, 687 S.E.2d 287 (2009), cert. denied, No. S10C0573, 2010 Ga. LEXIS 361 (Ga. 2010).

Because district courts are required to conduct a "rigorous analysis" into whether the prerequisites of Fed. R. Civ. P. 23 are met before certifying a class, that rigorous analysis should also apply to a trial court's decision under O.C.G.A. § 9-11-23(f)(1)(3) concerning whether the parties or the class have been prejudiced by an untimely motion for class certification. *Fuller v. Heartwood 11, LLC*, 301 Ga. App. 309, 687 S.E.2d 287 (2009), cert. denied, No. S10C0573, 2010 Ga. LEXIS 361 (Ga. 2010).

Interpretation of a form agreement proper for class action. — Trial court properly certified a class of individuals who purchased credit life or credit disability insurance from an insurer and who may be owed a refund from the insurer for unearned premiums on those policies. The interpretation of a form agreement presented a classic case of a common question of law appropriate for class adjudication. *Res. Life Ins. Co. v. Buckner*, 304 Ga. App. 719, 698 S.E.2d 19 (2010).

Class certification held proper. — The trial court properly granted class certification in an action where an insurance company customer alleged that the cus-

tomers and others had been inappropriately charged premiums and billing fees related to defendant's "automobile club"; the claims involved standard sales methods and practices common to class members, the customer as a recent "past insured" was not an inadequate representative, and it was not appropriate at the certification stage to consider whether the customer could prevail on the customer's claims. *Village Auto Ins. Co. v. Rush*, 286 Ga. App. 688, 649 S.E.2d 862 (2007), cert. denied, 2008 Ga. LEXIS 72 (Ga. 2008).

Subscribers sued an internet access provider alleging an early termination fee provision in their contracts was unenforceable. The need for individual damage calculations did not defeat class certification under O.C.G.A. § 9-11-23 since the subscribers sought remedies that would be standard and formulaic: a refund for those who paid the fee, and an injunction against enforcing the fee for those who did not. *EarthLink, Inc. v. Eaves*, 293 Ga. App. 75, 666 S.E.2d 420 (2008).

Trial court properly certified a class consisting of all similarly situated bankrupt mortgagors who had been assessed inspection and attorney fees by a mortgagee without prior notice or approval by the bankruptcy court. The claims of theft by conversion, theft by deception, and violations of Georgia RICO (O.C.G.A. § 16-14-4) did not require proof of reliance by each class member, thus making a class action unmanageable; as similar written representations were common to all the security agreements at issue, circumstantial evidence could be used to show that reliance was also common to the whole class. *Liberty Lending Servs. v. Canada*, 293 Ga. App. 731, 668 S.E.2d 3 (2008).

Trial court did not err in failing to ensure that a class notice included the information specified in O.C.G.A. § 9-11-23(b)(3) because the trial court's order certifying the class showed that the court found class certification appropriate under § 9-11-23(b)(2); the notice to potential class members was not subject to the requirements of § 9-11-23(c)(2). *Jones v. Forest Lake Vill. Homeowners Ass'n*, 304 Ga. App. 495, 696 S.E.2d 453 (2010).

Denial of class certification proper.

Students were not entitled to class certification in a suit alleging fraud by a university and its parent company because they failed to establish the O.C.G.A. § 9-11-23(b)(3) requirement of predominance since individualized proof was required to show if class members had relied to their detriment on the alleged fraud. *Diallo v. Am. Intercontinental Univ., Inc.*, 301 Ga. App. 299, 687 S.E.2d 278 (2009).

Trial court abused the court's discretion in granting certification under O.C.G.A. § 9-11-23(b)(2) based on a claim for medical monitoring because the recovery of monetary damages was at the core of the dispute between a patient, the patient's spouse, and a hospital; the trial court's order bifurcating the liability and damages phases, trying damages separately to a jury if necessary, demonstrated that the damages claims in the complaint overwhelmed the injunctive relief sought and were not merely incidental thereto. *Doctors Hosp. Surgery Ctr., LP v. Webb*, 307 Ga. App. 44, 704 S.E.2d 185 (2010).

Typicality. — Trial court properly adopted a special master's determination that certification of a class of evacuated residents following an accidental chemical release was warranted under O.C.G.A. § 9-11-23(a) as to all but one representative as the prerequisites of numerosity, commonality, typicality, and adequacy of representation were satisfied; however, as one class representative had settled that representative's claims against the chemical company, although the representative disputed whether the settlement was fair, the representative did not satisfy the typicality requirement. *Brenntag Mid South, Inc. v. Smart*, 308 Ga. App. 899, 710 S.E.2d 569 (2011).

Trial court erred in finding that a customer and the proposed class shared common questions of law and fact and that the customer was a sufficiently typical representative of that class under O.C.G.A. § 9-11-23(a)(2) and (a)(3) because the customer failed to prove that the response to the closing of the pharmacy was shared by other members of the class; given the customer's lack of actual injury, the customer was unlikely to vigorously litigate the action on behalf of the class. *Rite Aid*

of Ga., Inc. v. Peacock, No. A11A2133, 2012 Ga. App. LEXIS 319 (Mar. 22, 2012).

Number requirement not met. — Trial court erred in granting the customer's request for class certification because the class of nine was insufficient to meet the requirements of O.C.G.A. § 9-11-23(a)(1), and the customer failed to show the existence of other significant factors to warrant satisfaction of that requirement when, inter alia, the customer was capable of identifying all putative class members and there were no geographic constraints. *Am. Debt Found., Inc. v. Hodzic*, 312 Ga. App. 806, 720 S.E.2d 283 (2011).

Dismissal or Compromise

Interlocutory order certifying class was directly appealable. — An employee's motion to dismiss an appeal for lack of jurisdiction was denied as the trial court's interlocutory order certifying the class was directly appealable pursuant to O.C.G.A. § 9-11-23(g). *McDonald Oil Co. v. Cianocchi*, 285 Ga. App. 829, 648 S.E.2d 154 (2007).

Removal improper. — Because a customer's class action complaint brought pursuant to O.C.G.A. § 9-11-23 provided no information indicating the amount in controversy or the number of individuals in alternative classes, a bank and an affiliated credit card service improperly removed the action pursuant to 28 U.S.C. § 1332(d) of the Class Action Fairness Act of 2005 and 28 U.S.C. § 1446. *Thomas v. Bank of Am. Corp.*, 570 F.3d 1280 (11th Cir. 2009).

Dismissal of complaint erroneous. — Trial court's dismissal of a homeowner's complaint seeking a declaratory judgment that adjacent lot owners had an irrevocable easement or implied covenant in a golf club's golf course and an injunction restricting the use of the property to golf course purposes only was erroneous because after denying the homeowner's motion for class certification, the trial court was required to allow reasonable time for joinder of the proper plaintiffs before dismissing the action. *Peck v. Lanier Golf Club, Inc.*, 304 Ga. App. 868, 697 S.E.2d 922 (2010).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 16 Am. Jur. Pleading and Practice Forms, Labor and Labor Relations, § 2.

ALR. — Application of full faith and credit principles to class-action litigation and judgments, 50 ALR6th 281.

Propriety, under rules 23(a) and 23(b) of Federal Rules of Civil Procedure, as amended in 1966, of class action seeking

relief against pollution of environment, 19 ALR Fed. 2d 303.

Appealability of determination regarding confirmation of action as class action under Federal Rule of Civil Procedure Rule 23 and its enabling legislation (28 U.S.C.S. § 1292(e)), 22 ALR Fed. 2d 303.

Satisfaction of numerosity requirement in ERISA class actions, 26 ALR Fed. 2d 381.

9-11-24. Intervention.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
INTERVENTIONS OF RIGHT
PERMISSIVE INTERVENTION
TIME OF INTERVENTION

General Consideration

Construction with other law. — Subsequently-named corporation lacked standing to appeal from orders against the previously-named corporation as that corporation was not a party to the litigation, was not granted or denied intervention pursuant to a motion to amend with leave of court, and an attempted substitution by the predecessor was more than an attempt to correct a misnomer. *Degussa Wall Sys. v. Sharp*, 286 Ga. App. 349, 648 S.E.2d 687 (2007), cert. denied, 2007 Ga. LEXIS 701 (Ga. 2007).

Because the Georgia Business Corporation Code does not provide any specific mechanism concerning the intervention of parties in derivative actions, courts apply the general intervention statute, O.C.G.A. § 9-11-24, to motions to intervene in that context. *Stephens v. McGarrity*, 290 Ga. App. 755, 660 S.E.2d 770 (2008).

Cited in *Buckler v. DeKalb County*, 290 Ga. App. 190, 659 S.E.2d 398 (2008); *In re Estate of Nesbit*, 299 Ga. App. 496, 682 S.E.2d 641 (2009); *Bishop v. Patton*, 288 Ga. 600, 706 S.E.2d 634 (2011).

Interventions of Right

In a derivative action wherein a settlement was proposed for approval. — In a derivative action suit, a trial court abused the court's discretion by denying a minority shareholder's motion to intervene since the motion was timely and the minority shareholder established that the minority shareholder's interests were not adequately represented by the suing shareholder based on the large investment the minority shareholder had in the corporation and the fact that the settlement reached in the action would impact the minority shareholder's direct claims against the corporation. Further, the minority shareholder was entitled to a determination that the suing shareholder had adequately represented the corporation's interests up to and including the reaching of the settlement. *Stephens v. McGarrity*, 290 Ga. App. 755, 660 S.E.2d 770 (2008).

In an adoption proceeding, etc.

County Department of Family and Children Services was properly permitted to

intervene with regard to a couple's petition seeking to adopt a child as the child was adjudicated deprived and placed in the temporary custody of the Department. While the biological parents' surrenders of their parental rights was the basis for the adoption petition in the superior court, the Department remained the temporary legal custodian of the child pursuant to the juvenile court's deprivation order and, given that the Department's interest in the child as the temporary legal custodian was unrepresented in the adoption proceedings and at risk of impairment, the juvenile court did not err by allowing the Department to intervene through its objection to the adoption. *Sastre v. McDaniel*, 293 Ga. App. 671, 667 S.E.2d 896 (2008).

Judgment creditor had no right to intervene in action for reformation of a deed. — Trial court abused the court's discretion in allowing a borrower's judgment creditor to intervene as a matter of right pursuant to O.C.G.A. § 9-11-24 in the borrower's action against the lender for reformation of a deed pursuant to O.C.G.A. § 23-2-25. The creditor had no interest directly relating to the subject matter of the suit and had other remedies. *Potter's Props., LLC v. VNS Corp.*, 306 Ga. App. 621, 703 S.E.2d 79 (2010).

Permissive Intervention

Intervention in legitimation proceeding. — Trial court erred in granting a putative biological father's legitimation petition while a husband's timely, meritorious motion to intervene of right under O.C.G.A. § 9-11-24(a) was pending because when the husband moved to intervene in the legitimation proceeding he was the child's legal father and had parental and custodial rights to the child, and the husband clearly had an interest in the legitimation proceeding; the husband's interest as the child's legal father would be impaired by a decision of the trial court that was unfavorable to him, and his interest was not adequately represented by the parties to the action since the child's mother consented to the legitimation action. *Baker v. Lankford*, 306 Ga. App. 327, 702 S.E.2d 666 (2010).

Intervention was properly allowed.

When signatories to contribution agreement sought a judgment declaring the rights and obligations of the parties to the agreement, bank president was properly allowed to intervene under O.C.G.A. § 9-11-24(b)(2) to claim unpaid salary; as the bank was to be organized under the agreement, signatories of which also guaranteed employment contract, there were questions of law or fact in common, and no undue delay or prejudice to rights of original parties had been shown. *Ervin v. Turner*, 291 Ga. App. 719, 662 S.E.2d 721 (2008), cert. denied, 2008 Ga. LEXIS 773, 774, 794 (Ga. 2008).

Because the trial court applied the correct legal standard in O.C.G.A. § 19-7-1(b.1) in finding that the natural parent presumption was rebutted and that awarding custody to the grandparents was in the child's best interests, and because the grandparents were properly permitted to intervene under O.C.G.A. § 9-11-24(a)(2), the mother was not entitled to appellate relief. *Trotter v. Ayres*, No. A12A0702, 2012 Ga. App. LEXIS 245 (Mar. 5, 2012).

Party not allowed to appear in caption effectively denied motion to intervene. — Trial court's order allowing an insurer to intervene under O.C.G.A. § 9-11-24(a)(2) in the insured homeowner's action against a vehicle manufacturer for fire damage to the insured's home when the vehicle spontaneously caught fire was contradictory because the order did not allow the insurer to appear in the caption of the action or participate in the main action, amounting to a denial of the

motion. Therefore, remand was required. *Andrews v. Ford Motor Co.*, 310 Ga. App. 449, 713 S.E.2d 474 (2011).

Law firm not entitled to intervene in former client's case. — Trial court did not abuse the court's discretion in denying a law firm's motion under O.C.G.A. § 9-11-24(a)(2) to intervene in a former client's case because the firm was discharged from the case and filed the firm's lien pursuant to O.C.G.A. § 15-19-14(b) before the settlement, and the firm knew when the client had reached a settlement agreement but did not move to intervene as a party until over a month later; the firm was allowed to prosecute the firm's fee lien to the jury as a party, making opening statements, calling witnesses, introducing evidence, and arguing in closing. *Jones, Martin, Parriz & Tessener Law Offices, PLLC v. Westrex Corp.*, 310 Ga. App. 192, 712 S.E.2d 603 (2011).

Time of Intervention

Intervention denied.

Despite the claim by the owners of a corporation that the trial court erred in refusing to allow them to intervene in the case as the true owners of the property in question, because the owners never properly filed or asserted a motion to intervene, no error resulted; moreover, their argument that the trial court erred in refusing to allow them to file their motion to intervene also provided no basis for relief. *Rice v. Champion Bldgs., Inc.*, 288 Ga. App. 597, 654 S.E.2d 390 (2007), cert. denied, 2008 Ga. LEXIS 326 (Ga. 2008).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 19 Am. Jur. Pleading and Practice Forms, Parties, § 164.

ALR. — Right to intervene in court review of zoning proceeding, 47 ALR6th 439.

9-11-25. Substitution of parties.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 19 Am. Jur. Pleading and Prac-

tice Forms, Parties, § 263.

ARTICLE 5

DEPOSITIONS AND DISCOVERY

Law reviews. — For comment, “Jurisdictional, Procedural, and Economic Considerations for Non-Party Electronic Discovery,” see 59 Emory L.J. 1339 (2010).

For note, “Electronic Discovery in Georgia: Bringing the State out of the Typewriter Age,” 26 Ga. St. U.L. Rev. 551 (2010).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Proof of Basis for, and Grounds for Lifting, Work Product Protection Against Discovery, 39 POF3d 1.

Am. Jur. Trials. — Discovery — Written Interrogatories, 4 Am. Jur. Trials 1.

Discovery — Oral Deposition, 4 Am. Jur. Trials 119.

Request for Admissions by Plaintiff, 4 Am. Jur. Trials 185.

Request for Admissions by Defendant, 4 Am. Jur. Trials 215.

Motions for Production and Inspection, 4 Am. Jur. Trials 223.

Use of Videotape in Civil Trial Preparation and Discovery, 23 Am. Jur. Trials 95.

Trial Court Restrictions on Evidence of Defendant’s Wealth, 30 Am. Jur. Trials 711.

Unauthorized Disclosure of Confidential Patient Information, 32 Am. Jur. Trials 105.

Litigation Under the Freedom of Information Act, 50 Am. Jur. Trials 407.

Taking the Deposition of the Sexual Harassment Plaintiff, 65 Am. Jur. Trials 65.

Hidden and Multiple Defendant Tort Litigation, 68 Am. Jur. Trials 503.

How to Conduct International Discovery, 71 Am. Jur. Trials 1.

Surviving and Thriving in the Process of Preparing a Witness for Deposition, 87 Am. Jur. Trials 1.

Litigating Toxic Mold Cases, 91 Am. Jur. Trials 113.

Voir Dire in Low Speed Collision Cases — Plaintiff’s View, 96 Am. Jur. Trials 1.

Defending the Worker’s Compensation Claim in the Trucking Industry, 99 Am. Jur. Trials 1.

Use of Discovery in Product-Related Burn Injury Cases, 99 Am. Jur. Trials 141.

ALR. — Discovery of deleted e-mail and other deleted electronic records, 27 ALR6th 565.

9-11-26. General provisions governing discovery.

Cross references. — Protection of communications between victim assistance personnel and victims, § 17-17-9.1.

Law reviews. — For article, “Georgia’s New Expert Witness Rule: Daubert and

More,” see 11 Ga. St. B.J. 16 (No. 2, 2005). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SCOPE OF DISCOVERY

TRIAL PREPARATION MATERIALS

EXPERTS

PROTECTIVE ORDERS

General Consideration

Denial of motion to compel proper.

— Trial court did not abuse the court's discretion by denying a motion to compel discovery before ruling on an investor's motion for summary judgment because, although no express order was entered by the trial court denying the motion to compel discovery, it was not presumed that the trial court failed to consider the motion to compel before ruling on summary judgment, but rather, it was presumed that the trial court implicitly denied the motions to compel upon entering summary judgment; assuming the trial court properly exercised the court's discretion to delay the hearing on the motion for summary judgment and extend the time allowing a financial advisor to take depositions, there is no evidence that the advisor made any effort to schedule the depositions before the trial court rescheduled the hearing. *Tyler v. Thompson*, 308 Ga. App. 221, 707 S.E.2d 137 (2011).

Denial of motion to reopen discovery. — There was no abuse of discretion in the trial court's denial of a client's motion to reopen discovery given the length of time the case had been pending and the client's failure to specify the evidence the client hoped to obtain during discovery; the client did not detail any discovery the client needed to obtain. *Quarterman v. Cullum*, 311 Ga. App. 800, 717 S.E.2d 267 (2011).

Parties not obliged to confer about discovery plan. — A motorist's suit was properly dismissed under O.C.G.A. § 9-11-37(d), as the motorist failed to attend any of three scheduled depositions that were properly noticed under O.C.G.A. § 9-11-30(b)(1), defense counsel was not required to address the motorist's proposed discovery plan, and counsel's failure to do so did not excuse the motorist's failure to attend the depositions. *Pascal v. Prescod*, 296 Ga. App. 359, 674 S.E.2d 623 (2009).

Cited in *Nanan v. State Farm Ins. Co.*, 286 Ga. App. 539, 650 S.E.2d 283 (2007); *Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31 (2007); *Fulton DeKalb Hosp. Auth. v. Miller & Billips*, 293 Ga. App. 601, 667 S.E.2d 455 (2008); *In the Interest of B.H.*, 295 Ga. App. 297, 671 S.E.2d 303 (2008);

Bd. of Regents of the Univ. Sys. of Ga. v. Ambati, 299 Ga. App. 804, 685 S.E.2d 719 (2009).

Scope of Discovery

Communications between psychiatrist and patient are privileged.

Trial court erred in requiring a passenger to produce any confidential communications made between the passenger and the passenger's mental-health-care providers because the passenger's handling of discovery, albeit troublesome, did not amount to a decisive and unequivocal waiver of the passenger's mental-health privilege as the law required; the passenger's arguably misleading responses to opposing counsel's questions regarding a previous diagnosis of depression did not amount to a "decisive" and "unequivocal" waiver of the mental-health privilege, and the passenger's decision to answer the deposition question posed to the passenger (whether the passenger suffered from a history of depression), rather than object to the question at the time the issue of depression was raised, did not constitute an explicit waiver of the privilege. *Mincey v. Ga. Dep't of Cmty. Affairs*, 308 Ga. App. 740, 708 S.E.2d 644 (2011).

Loan documents. — Trial court erred in denying plaintiffs' discovery request that sought the discovery of documents pertaining to a development loan in a lawsuit involving a dispute between joint venturers as the trial court should have applied the proper standard of relevancy set forth in O.C.G.A. § 9-11-26, as opposed to ruling that plaintiffs simply had enough documents. *Hampton Island Founders v. Liberty Capital*, 283 Ga. 289, 658 S.E.2d 619 (2008).

Workers' compensation cases. — There was no error in denying a workers' compensation claimant's motion to compel production of certain documents and correspondence from an employer's claims adjuster because the employer met the employer's burden of showing that the documents were prepared in anticipation of litigation and thus were not discoverable; the claimant failed to establish the claimant's substantial need for the material. *S&B Eng'rs & Constructors Ltd. v. Bolden*, 304 Ga. App. 534, 697 S.E.2d 260,

cert. dismissed, No. S10C1789, 2010 Ga. LEXIS 912 (Ga. 2010).

Trial Preparation Materials

Company's revenues and profits relevant. — Trial court erred in denying a partner's motion to compel the discovery of the financial records of a company a copartner formed because the revenues and profits of the company could very well have some relevance to the proper measure of damages; the trial court erred in concluding that the revenues and profits that the company earned from business opportunities lost by the partnership could not possibly be probative of the damages that the partner could be entitled to recover and that the partner could not have any discovery of the finances of the company because some reasonable person could say that the revenues and profits the company earned from the same business opportunities could be a fair approximation of the revenues that the partnership would have earned from the opportunities and were, therefore, probative of the lost revenue and profit of the partnership. *McMillian v. McMillian*, 310 Ga. App. 735, 713 S.E.2d 920 (2011).

Accident investigation.

In a suit based on an explosion and fire in a cold storage warehouse facility during the installation of a compressor engine, a contractor was entitled to disclosure of the facility owner's accident report, which was prepared after an accident investigation conducted by the owner's personnel because the report was not protected by the work-product doctrine under O.C.G.A. § 9-11-26(b)(3) since it was not prepared in anticipation of litigation, but in the regular course of business in accordance with internal policies and applicable government regulations. *Alta Refrigeration, Inc. v. AmeriCold Logistics, LLC*, 301 Ga. App. 738, 688 S.E.2d 658 (2009).

Crash test documents from prior litigation. — In a negligence suit involving the death of an individual in an automobile collision, a trial court did not abuse the court's discretion by ordering the production of crash-test documents relating to prior litigation from an auto manufacturer as plaintiff showed a substantial need for the requested documents since

the requested evidence documented past car-to-car crash tests conducted by the auto manufacturer on a line of vehicles that included similar fuel tank locations and performance as the vehicle that was being driven by the decedent; the trial court properly concluded that plaintiff could not obtain the substantial equivalent of the crash tests absent undue hardship since plaintiff could not generate rear car-to-car crash tests that would have established the auto manufacturer's knowledge of dangers presented by the manufacturer's vehicle in rear car-to-car crashes; and the trial court ordered an in camera review of the documents with which the auto manufacturer refused to comply. *Ford Motor Co. v. Gibson*, 283 Ga. 398, 659 S.E.2d 346 (2008).

Experts

Deposing party to pay fees unless manifest injustice would result. — O.C.G.A. § 9-11-26(b)(4)(A)(ii) and (b)(4)(C)(ii), when read together, require that a party pay the reasonable fees of any expert it deposes or redeposes, unless doing so would create manifest injustice; in other words, a trial court is not entitled to shift the payment of the expert's fees to the other party unless the deposing party demonstrates that shifting the fees is necessary to avoid a manifest injustice. In order to determine whether the party seeking to shift fees has met its burden on this issue, the trial court needs to consider and weigh factors including the possible hardships imposed on the respective parties, the need for doing justice on the merits between the parties, whether a party is indigent, and the need for maintaining orderly and efficient procedural arrangements. *Barnum v. Coastal Health Servs.*, 288 Ga. App. 209, 653 S.E.2d 816 (2007), cert. denied, 2008 Ga. LEXIS 227 (Ga. 2008).

Experts previously identified as fact witnesses. — Trial court did not err by admitting the testimony of four expert witnesses because the witnesses were previously identified as fact witnesses and the supplemental responses in discovery were in compliance with the express terms of the discovery requests, O.C.G.A. § 9-11-26, and a pretrial order. LN West

Paces Ferry Assocs., LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85 (2010).

Expert testimony properly excluded. — Trial court did not err in excluding the testimony of a medical examiner because the testimony a decedent's relatives sought to elicit went beyond the matters the medical examiner personally performed or observed and into the area of opinion testimony based upon a hypothetical posed by the questioner; the relatives failed to disclose the proffered expert testimony in pretrial discovery, and the disputed expert testimony was cumulative of the opinion testimony of another expert witness. *Hewell v. Trover*, No. A11A2076, 2012 Ga. App. LEXIS 275 (Mar. 12, 2012).

Protective Orders

Failure to obtain protective order.

— The defendants' discovery violations were willful when the defendants withheld certain documents in order to "test their position," and as the defendants had not sought a protective order under O.C.G.A. § 9-11-26, but instead violated the trial court's orders compelling discovery by withholding the documents they claimed were objectionable, their failure to comply with discovery orders was not excused; thus, it was a proper sanction under O.C.G.A. § 9-11-37 to strike the defendants' arbitration defenses. *Ga. Cash Am., Inc. v. Strong*, 286 Ga. App. 405, 649 S.E.2d 548 (2007), cert. denied, 2007 Ga. LEXIS 709 (Ga. 2007).

Duty to attend deposition despite request for protective order. — Merely filing motions for a protective order did not relieve the plaintiffs from the duty to appear at their depositions. Moreover, even if the plaintiffs could have prevailed on motions to compel more complete responses to their discovery efforts, this did not excuse the plaintiffs from the duty to attend their depositions. It follows that the trial court correctly concluded that nothing the plaintiffs asserted in their motions for a protective order provided a legal basis for the court to exercise its discretion to relieve them from the duty to appear at their depositions. *Rice v. Cannon*, 283 Ga. App. 438, 641 S.E.2d 562 (2007).

Fifth Amendment claim denied. —

Denial of an accused's motion for a protective order under O.C.G.A. § 9-11-26(c) was affirmed as the Fifth Amendment could not be used to justify a protective order to stay all discovery in the accused's civil forfeiture proceeding under O.C.G.A. § 16-14-7 pending the conclusion of the accused's criminal Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., case; while the privilege against self-incrimination extends to answers creating a "real and appreciable" danger of establishing a link in the chain of evidence needed to prosecute, the trial court has to determine if the answers could incriminate the witness, and if the trial court determines that the answers could not incriminate the witness, the witness has to testify or be subject to the court's sanction. *Chumley v. State of Ga.*, 282 Ga. App. 117, 637 S.E.2d 828 (2006).

Protective order under Health Insurance Portability and Accountability Act. —

Trial court did not err in granting a hospital's motion for a qualified protective order under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to conduct ex parte interviews with a patient's health care providers because the hospital complied with 45 C.F.R. § 164.512(e)(1)(ii)(B), and any ex parte interviews conducted pursuant to the qualified protective order would be permitted under the HIPAA; because the order prohibited the use or disclosure of the patient's health information for purposes other than the litigation and required the return or destruction thereof at the conclusion of proceedings, it constituted a qualified protective order as defined in § 164.512(e)(1)(v). *Baker v. Wellstar Health Sys.*, 288 Ga. 336, 703 S.E.2d 601 (2010).

Protective order permitting a hospital to conduct ex parte interviews with a patient's health care providers was too broad regarding the scope of information that could be disclosed because the order should have limited the hospital's inquiry to matters relevant to the medical condition the patient had placed at issue; under O.C.G.A. § 24-9-40(a), a litigant can waive the right to medical privacy under

Georgia law only to the extent such information is relevant to the medical condition the litigant has placed in issue in the legal proceeding. *Baker v. Wellstar Health Sys.*, 288 Ga. 336, 703 S.E.2d 601 (2010).

Grant of protective order abuse of discretion. — Trial court abused the court's discretion in granting a protective order against a law partner's requests for admission to the former partner because, although the requests were numerous, the admissions were not propounded in bad faith, the admissions were specific and designed to narrow the issues in the case, and the admissions consisted of simple and straightforward recitations of fact that could be readily admitted or denied. *Moses v. Jordan*, 310 Ga. App. 637, 714 S.E.2d 262 (2011).

Protective order against state agency. — Trial court did not err in finding that the APA governed a declaratory judgment action filed against a state

agency, and that sovereign immunity barred any further discovery, pursuant to O.C.G.A. § 50-13-10; hence, as a result, when plaintiff consultant failed to comply with O.C.G.A. § 50-13-10, the trial court could do no more than to grant the agency a protective order, and could not take any action beyond that, including declaring that the Department's rules regarding health benefits could not be challenged. *Live Oak Consulting, Inc. v. Dep't of Cmty. Health*, 281 Ga. App. 791, 637 S.E.2d 455 (2006).

A trial court's refusal to enter a protective order was proper, because the opponent of the discovery did not show any of the grounds for such a motion specified in O.C.G.A. § 9-11-26(c), but merely objected that the discovery was untimely. *Simmons v. Cmty. Renewal & Redemption, LLC*, 286 Ga. 6, 685 S.E.2d 75 (2009).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 8A Am. Jur. Pleading and Practice Forms, Depositions and Discovery, § 2. 20A Am. Jur. Pleading and Practice

Forms, Pretrial Conference and Procedure, § 3.

ALR. — Discoverability of metadata, 29 ALR6th 167.

9-11-27. Depositions before action or pending appeal.

RESEARCH REFERENCES

ALR. — Construction and application of Fed. R. Civ. P. 27. 37 ALR Fed. 2d 573.

9-11-29. Stipulations regarding discovery procedure.

JUDICIAL DECISIONS

Modification of discovery procedures. — Trial court did not err in granting summary judgment to a mortgagee on the mortgagors' claims for wrongful eviction and trespass because the mortgagors failed to adhere to O.C.G.A. § 9-11-36(a)(2) since the mortgagors never answered or objected to the mortgagees' requests for admission within the statutory time period, and thus, the re-

quests were deemed admitted by the mortgagors; the mortgagor's reliance upon O.C.G.A. § 9-11-36(b) was misplaced under the circumstances because the parties modified the statutory discovery procedures by stipulation pursuant to O.C.G.A. § 9-11-29(2). *Ikomoni v. Exec. Asset Mgmt., LLC*, 309 Ga. App. 81, 709 S.E.2d 282 (2011).

9-11-29.1. When depositions and other discovery material must be filed with court; custodian until filing; retention of depositions and other discovery materials.

(a) Depositions and other discovery material otherwise required to be filed with the court under this chapter shall not be required to be so filed unless:

- (1) Required by local rule of court;
- (2) Ordered by the court;
- (3) Requested by any party to the action;

(4) Relief relating to discovery material is sought under this chapter and said material has not previously been filed under some other provision of this chapter, in which event copies of the material in dispute shall be filed by the movant contemporaneously with the motion for relief; or

(5) Such material is to be used at trial or is necessary to a pretrial or posttrial motion and said material has not previously been filed under some other provision of this chapter, in which event the portions to be used shall be filed with the clerk of court at the outset of the trial or at the filing of the motion, insofar as their use can be reasonably anticipated by the parties having custody thereof, but a party attempting to file and use such material which was not filed with the clerk at the outset of the trial or at the filing of the motion shall show to the satisfaction of the court, before the court may authorize such filing and use, that sufficient reasons exist to justify that late filing and use and that the late filing and use will not constitute surprise or manifest injustice to any other party in the proceedings.

(b) Until such time as discovery material is filed under paragraphs (1) through (5) of subsection (a) of this Code section, the original of all depositions shall be retained by the party taking the deposition and the original of all other discovery material shall be retained by the party requesting such material, and the person thus retaining the deposition or other discovery material shall be the custodian thereof.

(c) When depositions and other discovery material are filed with the clerk of court as provided in subsection (a) of this Code section, the clerk of court shall retain such original documents and materials until final disposition, either by verdict or appeal, of the action in which such materials were filed. The clerk of court shall be authorized thereafter to destroy such materials upon microfilming or digitally imaging such materials and maintaining such materials in a manner that facilitates retrieval and reproduction, so long as the microfilm and digital images

meet the standards established by the Georgia Department of Archives and History; provided, however, that the clerk of court shall not be required to microfilm or digitally image depositions that are not used for evidentiary purposes during the trial of the issues of the case in which such depositions were filed. (Code 1981, § 9-11-29.1, enacted by Ga. L. 1982, p. 2374, § 1; Ga. L. 2012, p. 599, § 1-1/HB 665.)

The 2012 amendment, effective July 1, 2012, deleted “the” preceding “court” in

the middle of paragraph (a)(5); and added subsection (c).

JUDICIAL DECISIONS

Burden of timely filing depositions, etc.

Because depositions relied upon by a husband and wife in their personal injury and loss of consortium action were not filed prior to the time a motion for summary judgment was ruled upon, their reference to the testimony contained therein could not be considered, and their brief in opposition to the summary judgment motion citing the testimony was not proper evidence for opposing the motion. *Parker v. Silviano*, 284 Ga. App. 278, 643 S.E.2d 819 (2007).

Untimeliness of filing discovery materials excused.

Order denying an employer’s motion for summary judgment as to a security guard’s assault and battery claims was vacated, and the case was remanded with direction that the trial court consider a messenger’s depositions in deciding the summary judgment motion as to the assault and battery claim issues regarding whether the messenger was an independent contractor or an employee and

whether the messenger was acting within the scope of employment at the time the messenger attacked the guard; at the time the trial court held the court’s hearing and signed the court’s summary judgment order, the employer failed to comply with the employer’s obligation under O.C.G.A. § 9-11-29.1(a)(3) to file the original deposition transcripts in the employer’s custody as the guard requested. The trial court, which relied on the briefs that cited to and quoted from the depositions, could not review that deposition testimony when the guard cited to the depositions in the guard’s trial court briefs, making a formal request that the employer, as custodian, file the original depositions, but the employer did not file the guard’s deposition until after the trial court had signed the court’s order and did not file the messenger’s deposition until months after the appeal was filed. *Ga. Messenger Serv. v. Bradley*, 302 Ga. App. 247, 690 S.E.2d 888 (2010).

Cited in *All Fleet Refinishing, Inc. v. W. Ga. Nat’l Bank*, 280 Ga. App. 676, 634 S.E.2d 802 (2006).

9-11-30. Depositions upon oral examination.

JUDICIAL DECISIONS

Testimony by department’s representative improperly excluded. — Georgia Department of Transportation (DOT) was permitted to present evidence through the department’s representative of its breach of contract damages under O.C.G.A. § 13-6-2 on its counterclaim because an asphalt company’s argument, that the damages calculations were too speculative because the DOT was unable

to show the exact amount of hydrated lime in each lot of asphalt, was asserting an insufficiency in the evidence that was not appropriately resolved on the company’s motion in limine. *State, DOT v. Douglas Asphalt Co.*, 297 Ga. App. 470, 677 S.E.2d 699 (2009), appeal dismissed, 297 Ga. App. 511, 677 S.E.2d 728 (2009).

Protective order barring video conference deposition proper. — Trial

court did not abuse the court's discretion in granting an assistant professor's motion for a protective order to bar a video conference deposition because the Board of Regents of the University System of Georgia (BOR) did not seek a court order, and the professor did not stipulate to the taking of the deposition; the BOR did not demonstrate any harm as a result of the trial court's action. *Bd. of Regents of the Univ. Sys. of Ga. v. Ambati*, 299 Ga. App. 804, 685 S.E.2d 719 (2009), cert. denied, No. S10C0086, 2010 Ga. LEXIS 34 (Ga. 2010).

Deposition erroneously admitted because deponent not permitted to read and sign. — Because a former homeowner testified by affidavit that the former homeowner was never notified by the officer that a deposition transcript was available for examination and signature, and the defendants in the wrongful eviction action offered no testimony or evidence to rebut the former owner's affidavit, the trial court erred by admitting the former owner's deposition for purposes of summary judgment. However, admission of the deposition was harmless error, be-

cause the operative evidence came in through the homeowner's and others' affidavits. *Steed v. Fed. Nat'l Mortg. Corp.*, 301 Ga. App. 801, 689 S.E.2d 843 (2009).

Suit properly dismissed due to party's failure to attend scheduled depositions that were properly noticed. — A motorist's suit was properly dismissed under O.C.G.A. § 9-11-37(d), as the motorist failed to attend any of three scheduled depositions that were properly noticed under O.C.G.A. § 9-11-30(b)(1), defense counsel was not required to address the motorist's proposed discovery plan, and counsel's failure to do so did not the excuse the motorist's failure to attend the depositions. *Pascal v. Prescod*, 296 Ga. App. 359, 674 S.E.2d 623 (2009).

Cited in *Wal-Mart Stores, Inc. v. Lee*, 290 Ga. App. 541, 659 S.E.2d 905 (2008); *McGuire Holdings, LLLP v. TSQ Partners, LLC*, 290 Ga. App. 595, 660 S.E.2d 397 (2008); *Jones v. Baran Co., LLC*, 290 Ga. App. 578, 660 S.E.2d 420 (2008); *Davis v. Harpagon Co., LLC*, 283 Ga. 539, 661 S.E.2d 545 (2008); *Yearly v. State*, 289 Ga. 394, 711 S.E.2d 694 (2011).

ADVISORY OPINIONS OF THE STATE BAR

Notice of deposition required. — O.C.G.A. § 9-11-45 provides that a subpoena shall issue for persons sought to be deposed and may command the person to produce documents. O.C.G.A. § 9-11-30(b)(1) requires notice to every

other party of all depositions. Reading §§ 9-11-30 and 9-11-45 together, it is obvious that before a subpoena can be issued, notice of the deposition must be given to all parties. *Adv. Op. No. 84-40* (September 21, 1984).

9-11-32. Use of depositions in court proceedings; effect of errors and irregularities in depositions.

JUDICIAL DECISIONS

ANALYSIS

USE OF DEPOSITIONS
CROSS-EXAMINATION
ERRORS AND OBJECTIONS

Use of Depositions

Recent tonsillectomy was "illness or infirmity." — Witness's deposition testimony that as a result of a recent tonsillectomy the witness was very weak and

physically unable to attend trial was sufficient to show that the witness was unavailable due to illness or infirmity under O.C.G.A. § 9-11-32, and the trial court did not err in admitting the witness's deposi-

tion at trial. *Rescigno v. Vesali*, 306 Ga. App. 610, 703 S.E.2d 65 (2010).

Imprisonment of deponent. — Trial court did not err pursuant to O.C.G.A. § 9-11-32 by admitting the testimony of a plumbing contractor by way of deposition because the contractor was imprisoned at the time of the trial. Furthermore, the opposing party had the opportunity to cross-examine the contractor at the deposition. *LN West Paces Ferry Assocs., LLC v. McDonald*, 306 Ga. App. 641, 703 S.E.2d 85 (2010).

Cross-Examination

Making witness one's own. — Trial court was authorized to find that, by insisting that a part of a deposition which contained a reference to the supposed excellence of the former employee of defendant be read to the jury, defendant had made the witness its own, where the portion of the deposition was not relevant to those parts of the deposition submitted by

plaintiff. *Orkin Exterminating Co. v. Carder*, 258 Ga. App. 796, 575 S.E.2d 664 (2002) (Unpublished).

Errors and Objections

Waiver of objections to use of depositions at trial. — In appeals filed by both former spouses from a trial court order modifying visitation and child support provisions in their final judgment and decree of divorce, they waived their claims that the trial court abused its discretion in conducting the final hearing by taking most testimony only by deposition and restricting the amount of time that each party could testify under O.C.G.A. § 9-11-32(a)(4); the record was devoid of objections by either party to the trial court's announced procedure for conducting the final hearing, either at the hearing or in response to the trial court's written orders setting forth the process. *Facey v. Facey*, 281 Ga. 367, 638 S.E.2d 273 (2006).

9-11-33. Interrogatories to parties.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Dismissal or default judgment appropriate following failure to answer or object.

Trial court did not err in entering a default judgment against sellers pursuant to O.C.G.A. § 9-11-37(b)(2) without conducting a hearing on willfulness because the sellers did not file answers to a bro-

ker's request for interrogatories and production of documents within the time period prescribed by O.C.G.A. §§ 9-11-33(a)(2) and 9-11-34(b)(2), and the sellers only filed a response to the request after the trial court's grant of the broker's initial motion to compel and for sanctions. *Cochran v. Kennelly*, 306 Ga. App. 838, 703 S.E.2d 411 (2010).

9-11-34. Production of documents and things and entry upon land for inspection and other purposes; applicability to nonparties; confidentiality.

Law reviews. — For annual survey on law of torts, see 61 Mercer L. Rev. 335 (2009).

JUDICIAL DECISIONS

Cell phone records not discoverable. — Trial court did not abuse its discretion in quashing a subpoena for the appellee's cell phone records, as those records were not reasonably calculated to lead to the discovery of admissible evidence under O.C.G.A. § 24-10-22 or information relevant to the intrusive nature of the behavior alleged to be tortious. *Anderson v. Mergenhausen*, 283 Ga. App. 546, 642 S.E.2d 105 (2007).

Financial records of law firm against which punitive damages sought. — When the trial court determined that jury issues remained as to a claim for punitive damages against a law firm, the trial court abused the court's discretion in denying production of any of the law firm's financial records until after the jury rendered the jury's verdict. *Smith v. Morris, Manning & Martin, LLP*, 293 Ga. App. 153, 666 S.E.2d 683 (2008).

Requiring lawyer to turn over computer hard drive. — Trial court abused the court's discretion in requiring a lawyer to turn over a computer hard drive from the lawyer's former partnership to the former partner in the partner's suit

against the lawyer seeking dissolution of the partnership. Nothing in the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, provided authority for the trial court to confiscate the personal property of a party through a protective order under the guise of determining the scope of permissible discovery. *Moses v. Jordan*, 310 Ga. App. 637, 714 S.E.2d 262 (2011).

Default judgment appropriate following failure to answer. — Trial court did not err in entering a default judgment against sellers pursuant to O.C.G.A. § 9-11-37(b)(2) without conducting a hearing on willfulness because the sellers did not file answers to a broker's request for interrogatories and production of documents within the time period prescribed by O.C.G.A. §§ 9-11-33(a)(2) and 9-11-34(b)(2), and the sellers only filed a response to the request after the trial court's grant of the broker's initial motion to compel and for sanctions. *Cochran v. Kennelly*, 306 Ga. App. 838, 703 S.E.2d 411 (2010).

Cited in *Nanan v. State Farm Ins. Co.*, 286 Ga. App. 539, 650 S.E.2d 283 (2007); *Haughton v. Canning*, 287 Ga. App. 28, 650 S.E.2d 718 (2007).

RESEARCH REFERENCES

ALR. — Discoverability of metadata, 29 ALR6th 167.

9-11-34.1. Civil actions for evidence seized in criminal proceedings.

Notwithstanding the provisions of Code Section 9-11-34, in any civil action based upon evidence seized in a criminal proceeding involving any violation of Part 2 of Article 3 of Chapter 12 of Title 16, a party shall not be permitted to copy any books, papers, documents, photographs, tangible objects, audio and visual tapes, films and recordings, or copies or portions thereof. (Code 1981, § 9-11-34.1, enacted by Ga. L. 2008, p. 829, § 1/HB 1020.)

Effective date. — This Code section became effective July 1, 2008.

9-11-36. Requests for admission.**JUDICIAL DECISIONS****ANALYSIS**

GENERAL CONSIDERATION

ANSWERS AND OBJECTIONS

3. FAILURE TO ANSWER OR OBJECT

4. EXTENSION OF TIME

WITHDRAWAL OR AMENDMENT OF ADMISSION

USE OF ADMISSIONS

SUMMARY JUDGMENT

General Consideration

Cited in *Neal v. State Farm Fire & Cas. Co.*, 300 Ga. App. 68, 684 S.E.2d 132 (2009).

Answers and Objections**3. Failure to Answer or Object****Effect of failure to answer or object.**

In a finance corporation's suit to recover a deficiency balance on an installment sales contract for a log loader, the trial court properly granted the corporation summary judgment upon concluding that no genuine issues of material fact existed based on the defending trucking company and the company's president failing to answer the requests for admissions that were served simultaneously with the complaint. By failing to respond and never challenging the trial court's denial of the motion to withdraw the admissions filed by the trucking company and the company's president, the following allegations were deemed admitted: that true and correct copies of the relevant documents, including the demand for payment were received; that the president executed the installment sales contract and the guaranty; that the president failed to make payments thereunder; that the principal balance due under the contract and guaranty was \$ 34,442.44 as of a certain date; and that the money was owed to the finance corporation. *JJM Trucking, Inc. v. Caterpillar Fin. Servs. Corp.*, 295 Ga. App. 560, 672 S.E.2d 529 (2009).

Debtor's failure to respond to requests for admission served after the debtor objected to improper venue was not excused by the objection to venue, and, after a

transfer of venue, the transferee trial court properly granted summary judgment to the creditor based on the debtor's admissions in the transferor court, pursuant to O.C.G.A. § 9-11-36. *Jackson v. Nemdegelt, Inc.*, 302 Ga. App. 767, 691 S.E.2d 653 (2010).

Trial court did not err in granting summary judgment to a mortgagee on the mortgagors' claims for wrongful eviction and trespass because the mortgagors failed to adhere to O.C.G.A. § 9-11-36(a)(2) since the mortgagors never answered or objected to the mortgagees' requests for admission within the statutory time period, and thus, the requests were deemed admitted by the mortgagors; the mortgagor's reliance upon O.C.G.A. § 9-11-36(b) was misplaced under the circumstances because the parties modified the statutory discovery procedures by stipulation pursuant to O.C.G.A. § 9-11-29(2). *Ikomoni v. Exec. Asset Mgmt., LLC*, 309 Ga. App. 81, 709 S.E.2d 282 (2011).

Pro se defendants did not fail to respond to requests for admission. —

It was error to find that pro se defendants failed to respond to requests for admission under O.C.G.A. § 9-11-36(b). Although defendants stated that the defendants were answering the complaint, it was clear from the number and the content of the responses that the defendants were responding to the requests for admission rather than to the complaint; furthermore, a reasonable interpretation of the statement with which all three defendants' answers concluded was not that defendants were not responding to any discovery requests, but that having re-

sponded to the requests for admission, the defendants would not be responding to the remaining discovery requests. *Robinson v. Global Res., Inc.*, 300 Ga. App. 139, 684 S.E.2d 104 (2009).

4. Extension of Time

Authority of court to extend time for answering.

Pursuant to O.C.G.A. § 9-11-36(b), a trial court properly granted a bank a one-day extension to respond to a request to admit after the bank served the bank's response one day late because the trial court found excusable neglect based on the bank's counsel's mistaken belief that the opposing party's counsel had granted a one-day extension in which to respond. *131 Ralph McGill Blvd., LLC v. First Intercontinental Bank*, 305 Ga. App. 493, 699 S.E.2d 823 (2010).

Withdrawal or Amendment of Admission

Motion to withdraw proper.

Trial court did not err in allowing the withdrawal of admissions made by operation of law pursuant to O.C.G.A. § 9-11-36(b) because O.C.G.A. § 9-11-16(b), governing pretrial orders, did not apply to limit the trial court's discretion to permit withdrawal of the disputed admissions where the trial court's June 5 scheduling order was not intended as a pretrial order. *Velasco v. Chambless*, 295 Ga. App. 376, 671 S.E.2d 870 (2008).

Trial court did not abuse the court's discretion in granting a lessee's motion to withdraw admissions that had been deemed admitted by virtue of the lessee's failure to respond to discovery because although the lessee's failure to respond to a lessor's request resulted in an admission that the lessee was jointly liable for the debts of a limited liability company (LLC), the lessee was not a party to nor a guarantor of the lease agreement, and that evidence was sufficient to refute the lessor's allegations that the lessee shared personal liability for the debts of the LLC and to further conclude that the lessee's denial of liability was not simply a delaying tactic; the lessor did not establish that the withdrawal would prejudice the lessor

in maintaining the action on the merits. *ABA 241 Peachtree, LLC v. Brooken & McGlothen, LLC*, 302 Ga. App. 208, 690 S.E.2d 514 (2010).

Refusal to allow withdrawal of admissions was not an abuse of discretion.

Denial of a defendant's motion to withdraw admissions under O.C.G.A. § 9-11-36(b) was proper because the defendant failed to establish that presentation of the merits would have been subserved by permitting the withdrawal; the defendant's pleadings contained perfunctory denials and failed to present or refer to any admissible evidence. *Turner v. Mize*, 280 Ga. App. 256, 633 S.E.2d 641 (2006).

A trial court properly denied a real estate seller's motion to withdraw its admissions. The trial court was authorized to construe the inconsistent statements of the seller's principal against the seller, absent a reasonable explanation to explain the contradiction; moreover, the principal's contention that the parties expressly agreed to give the seller the authority to unilaterally increase the sales price without notice would vitiate the sales agreement. *Fox Run Props, LLC v. Murray*, 288 Ga. App. 568, 654 S.E.2d 676 (2007).

In a premises liability suit brought by the parents of a decedent, the trial court did not err in denying the parents' motion to withdraw their admissions. The parents failed to present evidence contradicting the admissions to be withdrawn, which helped establish that the decedent voluntarily entered into a violent fight with an acquaintance to resolve a personal money dispute. *Porter v. Urban Residential Dev. Corp.*, 294 Ga. App. 828, 670 S.E.2d 464 (2008).

It was not error, in a workers' compensation case, to deny the motion of an employer and insurer to withdraw or amend the employer's and insurer's deemed admissions to a worker's requests for admission because: (1) the employer and insurer did not answer the requests, resulting in the deemed admissions under O.C.G.A. § 9-11-36(a)(2) and (b); and (2) any error in denying the motion was harmless as the admissions were cumula-

tive of other evidence showing the worker's disability. *Ready Mix United States, Inc. v. Ross*, No. A11A2173, 2012 Ga. App. LEXIS 283 (Mar. 14, 2012).

Use of Admissions

Limitation on use of admissions.

After movant creditor sought sanctions, pursuant to Fed. R. Bankr. P. 9011, against debtor's counsel for alleged misconduct, the court would not consider new allegation that had not been noticed for 21 days, and would not consider admissions made by the debtor in a different proceeding, under O.C.G.A. § 9-11-36(b). *Schwindler v. Screen* (In re Screen), 2004 Bankr. LEXIS 2655 (Bankr. S.D. Ga. June 4, 2004).

Summary Judgment

When summary judgment proper.

By failing to respond to requests for admissions under O.C.G.A. § 9-11-36(a), a resident made admissions which left no material issue of triable fact on the resident's complaint, so the entry of summary judgment against the resident on the merits based on the failure to respond to discovery was proper. *Le v. Shepherd's Pond Homeowners Ass'n*, 280 Ga. App. 36, 633 S.E.2d 363 (2006).

In insureds' suit against a construction company regarding the company's mold remediation work on the insureds' home, since the company had filed a counterclaim for unpaid rental fees, summary judgment in favor of the company was proper because the insureds' failure to respond to the company's requests for admissions conclusively established the facts set out in the requests such that no genuine issues of material fact remained for resolution by a jury. *Stephens v. Alan V. Mock Construction Co., Inc.*, 302 Ga. App. 280, 690 S.E.2d 225, cert. denied, No. S10C1012, 2010 Ga. LEXIS 533 (Ga. 2010).

When summary judgment improper. — Because the trial court applied the wrong legal standard in refusing to allow defendants to withdraw their admissions, and should have applied the standard set forth in O.C.G.A.

§ 9-11-36(b) and considered whether withdrawal would serve the presentation of the merits and whether it would prejudice plaintiffs, summary judgment was improper; moreover, the trial court erroneously held that summary judgment was proper because defendants had shown no excuse for their former counsel's failure to respond to plaintiffs' request for admissions, as defendants were not required to make such a showing. *Sayers v. Artistic Kitchen Design, LLC*, 280 Ga. App. 223, 633 S.E.2d 619 (2006).

Trial court did not err in denying the purchasers' motion for summary judgment on the basis that the motion was unsupported by any evidence because the court found that the sellers' responses to the purchasers' first request for admissions could not be deemed admitted by operation of law since the responses were timely and asserted objections to the request for admissions; the objections cited attorney work product, attorney client privilege, discovery intended to harass the sellers, and the trial court's failure to rule on two pending discovery motions. *Sarif v. Novare Group, Inc.*, 306 Ga. App. 741, 703 S.E.2d 348 (2010).

Failure to respond to request for admissions. — Supplier, which sought to collect amounts owed on an open account from a contractor and a guarantor, was entitled to summary judgment because the contractor's and the guarantor's failure to respond to a request for admissions resulted in the admission of all of the material facts supporting the supplier's claims under O.C.G.A. § 9-11-36(a)(2). *Powerhouse Custom Homes, Inc. v. 84 Lumber Co., L.P.*, 307 Ga. App. 605, 705 S.E.2d 704 (2011).

Service of responses. — Service of responses to requests to admit was timely as calculated pursuant to O.C.G.A. § 1-3-1(d)(3); therefore, the requests were not deemed admitted. The fact that the certificate of service was not filed with the clerk under Ga. Unif. Super. Ct. R. 5.2 until later did not impact the fact that service of the responses was timely. *Cruickshank v. Fremont Inv. & Loan*, 307 Ga. App. 489, 705 S.E.2d 298 (2010).

9-11-37. Failure to make discovery; motion to compel; sanctions; expenses.

Law reviews. — For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008). For annual survey on trial practice and procedure, see 61

Mercer L. Rev. 363 (2009). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

JUDICIAL DECISIONS

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GENERAL CONSIDERATION

FAILURE TO COMPLY WITH ORDER

FAILURE TO RESPOND TO DISCOVERY REQUESTS

General Consideration

Sanction of dismissal, etc.

In a medical malpractice case where the trial court dismissed a married couple's claims against two defendants because it found that the couple abused the civil litigation process, O.C.G.A. § 9-11-37(b) did not support the trial court's action; the complaint had not been dismissed as a discovery sanction. *Whitley v. Piedmont Hosp., Inc.*, 284 Ga. App. 649, 644 S.E.2d 514 (2007), cert. denied, 2007 Ga. LEXIS 626, 651 (Ga. 2007).

Suit properly dismissed due to party's failure to attend scheduled depositions that were properly noticed. — A motorist's suit was properly dismissed under O.C.G.A. § 9-11-37(d), as the motorist failed to attend any of three scheduled depositions that were properly noticed under O.C.G.A. § 9-11-30(b)(1), defense counsel was not required to address the motorist's proposed discovery plan, and counsel's failure to do so did not excuse the motorist's failure to attend the depositions. *Pascal v. Prescod*, 296 Ga. App. 359, 674 S.E.2d 623 (2009).

Discretion of trial court not interfered with.

In a medical malpractice suit, a trial court did not abuse the court's discretion in denying parents' O.C.G.A. 9-11-37(a)(2) motion to compel a doctor to answer a deposition question regarding why the doctor no longer delivered babies because the parents' did not comply with Ga. Unif. Super. Ct. R. 6.4(B) by conferring with opposing counsel in a good faith effort to resolve the discovery dispute, and the

requested information was immaterial after the trial court dismissed the underlying breach of fiduciary claim. *Hooks v. Humphries*, 303 Ga. App. 264, 692 S.E.2d 845 (2010).

Dismissal sanction applies to disobedience of order to produce.

Corporation was improperly prevented from exercising its right to dismiss its action as it did not have prior knowledge that the action would be dismissed as requested in a limited liability partnership's motion for sanctions for alleged discovery abuses when the notice of voluntary dismissal was filed. *Mariner Health Care, Inc. v. PricewaterhouseCoopers, LLP*, 282 Ga. App. 217, 638 S.E.2d 340 (2006), cert. denied, 2007 Ga. LEXIS 150 (Ga. 2007).

No default judgment on pleadings.

— Failure of a nonmoving party to file responsive material does not automatically entitle the moving party to judgment because there is no such thing as a default judgment on the pleadings. *Cameron v. Miles*, 311 Ga. App. 753, 716 S.E.2d 831 (2011).

There is no authority for a co-defendant to become the beneficiary of a dismissal, etc.

The trial court erred in finding two guarantors in contempt and ordering their incarceration for failing to comply with a post-judgment discovery order without affording them notice and an opportunity to be heard, in violation of their due process rights. *Harrell v. Fed. Nat'l Payables, Inc.*, 284 Ga. App. 395, 643 S.E.2d 875 (2007).

Fifth Amendment privilege. — Denial of an accused's motion for a protective order under O.C.G.A. § 9-11-26(c) was affirmed as the Fifth Amendment could not be used to justify a protective order to stay all discovery in the accused's civil forfeiture proceeding under O.C.G.A. § 16-14-7 pending the conclusion of the accused's criminal Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., case; while the privilege against self-incrimination extends to answers creating a "real and appreciable" danger of establishing a link in the chain of evidence needed to prosecute, the trial court has to determine if the answers could incriminate the witness, and if the trial court determines that the answers could not incriminate the witness, the witness has to testify or be subject to the court's sanction. *Chumley v. State of Ga.*, 282 Ga. App. 117, 637 S.E.2d 828 (2006).

Intentional false response in negligence action resulted in sanctions. — In a negligence suit wherein a train patron was attacked and raped while exiting a train station, a trial court properly struck a public transportation authority's answer for the authority's intentionally false response regarding the creation and maintenance of the documents that would have reflected the security officers' activities during the relevant shifts. The evidence established that the authority intentionally destroyed the logs of the security officers then represented to the train patron and the trial court that the documents did not exist. *MARTA v. Doe*, 292 Ga. App. 532, 664 S.E.2d 893 (2008).

False response equivalent to failure to respond and justified sanctions. — An intentionally false response to a document production request, particularly concerning a pivotal issue in the litigation, authorizes a trial court to impose the sanctions permitted by O.C.G.A. § 9-11-37 for a total failure to respond. *MARTA v. Doe*, 292 Ga. App. 532, 664 S.E.2d 893 (2008).

Ex parte communications. — Because a patient provided an authorization form that did not in any way restrict discussions between defense counsel and the patient's former treating physicians, the trial court did not err by denying the

patient's O.C.G.A. § 9-11-37 motion for sanctions based upon ex parte communications between the doctor's attorney and a cardiologist in violation of the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d et seq. *Hamilton v. Shumpert*, 299 Ga. App. 137, 682 S.E.2d 159 (2009).

No error in reopening discovery as a sanction. — Trial court did not err in reopening discovery as a sanction for a passenger's conduct pursuant to O.C.G.A. § 9-11-37 because it was well within the trial court's discretion to reopen discovery to provide the employer with an opportunity to fully explore the relevant aspects of the employer's defense; moreover, there was evidence to support the trial court's finding as to the lack of completeness and veracity in the passenger's deposition and discovery responses. *Mincey v. Ga. Dep't of Cmty. Affairs*, 308 Ga. App. 740, 708 S.E.2d 644 (2011).

Award of attorney fees proper when needless expenses incurred. — In awarding attorney fees to the appellees under O.C.G.A. §§ 9-11-37 and 9-15-14 after an appellant voluntarily dismissed the appellant's lawsuit, the trial court did not violate the legislative intent behind O.C.G.A. § 9-11-41(a). The appellees incurred needless expense because of the appellant's discovery violations, and the litigation was unnecessarily expanded prior to the appellant's voluntary dismissal. *Hart v. Redmond Reg'l Med. Ctr.*, 300 Ga. App. 641, 686 S.E.2d 130 (2009).

Cited in *In the Interest of B.H.*, 295 Ga. App. 297, 671 S.E.2d 303 (2008).

Failure to Comply with Order

Imposition of lesser sanctions than dismissal and default, etc.

In a negligence suit involving the death of an individual in an automobile collision, a trial court did not abuse the court's discretion by precluding an auto manufacturer from contesting certain issues at trial based on the auto manufacturer's failure to follow the trial court's order to produce crash tests results documentation from prior litigation as the trial court held a hearing in which the auto manufacturer had the opportunity to explain the continued refusal to produce the documents and,

instead of imposing the ultimate sanction of dismissal or default judgment for failure to comply with discovery, the trial court instead concluded that the willful disobedience was subject to the lesser sanction of issue preclusion. *Ford Motor Co. v. Gibson*, 283 Ga. 398, 659 S.E.2d 346 (2008).

Discovery sanction not directly appealable. — In a civil suit, an appellate court properly dismissed an appeal of an order finding the appellants in contempt for violating a discovery order and that dismissed the answer and entered a default judgment as to liability as the order was not directly appealable as a contempt judgment under O.C.G.A. § 5-6-34(a)(2) since the order did not impose a civil or criminal contempt sanction but rather imposed a discovery sanction under O.C.G.A. § 9-11-37(b)(2)(C). *Am. Med. Sec. Group, Inc. v. Parker*, 284 Ga. 102, 663 S.E.2d 697 (2008).

Attorney fees imposed.

Trial court did not abuse the court's discretion in awarding an assistant professor attorney fees as prayed for in the professor's motion for a protective order because an award of fees was authorized by O.C.G.A. § 9-11-37(a)(4)(A). *Bd. of Regents of the Univ. Sys. of Ga. v. Ambati*, 299 Ga. App. 804, 685 S.E.2d 719 (2009), cert. denied, No. S10C0086, 2010 Ga. LEXIS 34 (Ga. 2010).

Court retained jurisdiction after remand. — Before an appellate court reversed the trial court's denial of summary judgment to the defendant, the trial court had found that the defendant had abused the discovery process; as the trial court had expressly reserved the issue of sanctions for later determination, it had jurisdiction, after remand, to award the plaintiff's attorney's fees under O.C.G.A. § 9-11-37(d). *CSX Transp., Inc. v. Deen*, 278 Ga. App. 845, 630 S.E.2d 119 (2006).

Hearing required for determination of failure to comply with order.

In a personal injury action, although the trial court stated in its dismissal order that an injured party's noncompliance with a court-ordered sanction was willful, because the appeals court could not make that determination from the record, and the injured party was not afforded a hear-

ing prior to the imposition of attorney fees and dismissal, the order was reversed; however, the fact that the court-ordered sanction was erroneous did not excuse the injured party's failure to comply with it. *Cole v. Hill*, 286 Ga. App. 535, 649 S.E.2d 633 (2007).

Hearing not required. — In an action to recover unpaid legal fees, a law firm was not entitled to a hearing on a motion for discovery sanctions under O.C.G.A. § 9-11-37(d) against former clients because the trial court was not contemplating the ultimate sanction of dismissal or a default judgment and the clients did not willfully fail to comply as the clients did not receive the post-judgment interrogatories. *McFarland & McFarland, P.C. v. Holtzclaw*, 293 Ga. App. 663, 667 S.E.2d 874 (2008).

Willfulness required for harsh sanctions.

Because the trial court failed to make an explicit finding of willfulness in its order dismissing the plaintiff's case for failure to comply with an order compelling discovery, the dismissal was reversed, and the case was remanded for a hearing on the issue. *Rouse v. Arrington*, 283 Ga. App. 204, 641 S.E.2d 214 (2007).

Hearing on willfulness not required. — Trial court did not err in entering a default judgment against sellers pursuant to O.C.G.A. § 9-11-37(b)(2) without conducting a hearing on willfulness because the sellers did not file answers to a broker's request for interrogatories and production of documents within the time period prescribed by O.C.G.A. §§ 9-11-33(a)(2) and 9-11-34(b)(2), and the sellers only filed a response to the request after the trial court's grant of the broker's initial motion to compel and for sanctions. *Cochran v. Kennelly*, 306 Ga. App. 838, 703 S.E.2d 411 (2010).

Remand for willfulness issue where trial court failed to make explicit willfulness finding. — Because the trial court failed to explicitly make a finding of willfulness in its order dismissing the plaintiff's damages complaint for failure to comply with an order to compel, directing the plaintiff to fully and completely respond to the defendant's interrogatories and requests for production, and in any

event, the court could not say that such a determination could be made from the record, the matter was remanded directing the trial court to conduct a hearing on the issue of willfulness. *Rouse v. Arrington*, 283 Ga. App. 204, 641 S.E.2d 214 (2007).

Finding of willfulness authorized.

Trial court did not err in imposing discovery sanctions against a credit life insurer in a class action involving 900,000 policies because the insurer failed to provide the requested information on its policy-holders for over six years after it was ordered to do so, and the information was available to it. *Res. Life Ins. Co. v. Buckner*, 304 Ga. App. 719, 698 S.E.2d 19 (2010).

Dismissal of complaint proper.

Trial court properly dismissed the plaintiffs' pro se complaint pursuant to O.C.G.A. § 9-11-37(d) on grounds that the plaintiffs willfully failed to appear for their depositions, as the court's failure to rule on their pending motions, including motions to compel, a motion for a more complete response, and a motion for protective order, did not excuse their attendance; moreover, the grounds plaintiffs asserted in their motion for protective order provided no basis for the trial court to order that they were not obligated to attend their depositions. *Rice v. Cannon*, 283 Ga. App. 438, 641 S.E.2d 562 (2007).

The trial court's dismissal of a suit brought by certain homeowners against an insurer for the homeowners' refusal to comply with various discovery orders of the trial court was upheld on appeal since by sworn affidavit, counsel for the insurer averred and sufficiently established that the homeowners never appeared for depositions; no hearing was required under O.C.G.A. § 9-11-37 for the trial court to determine the willfulness of the homeowners' noncompliance since the record established that hearings were held on the insurer's motions for sanctions. *Nanan v. State Farm Ins. Co.*, 286 Ga. App. 539, 650 S.E.2d 283 (2007), cert. denied, 129 S. Ct. 496, 172 L.Ed.2d 358 (2008).

Trial court properly dismissed the plaintiffs' complaint for failing to comply with a discovery order. Plaintiffs' counsel

repeatedly misrepresented that counsel would provide discovery about an expert witness and counsel's failure to do so resulted in more than one extension of the discovery period and also more than one continuance of the trial. *Freeman v. Foss*, 298 Ga. App. 498, 680 S.E.2d 557 (2009).

Dismissal of complaint improper.

Because damages were presumed to flow from an alleged tortious act, a party alleging the commission of a tort was not required to provide the court with a detailed statement of damages. Thus, the trial court erred in dismissing the case for that party's failure to comply with such an order. *Wilson v. Home Depot USA, Inc.*, 288 Ga. App. 582, 654 S.E.2d 408 (2007), cert. denied, 2008 Ga. LEXIS 403 (Ga. 2008).

It was an abuse of discretion to dismiss a dog breeder's breach of contract suit under O.C.G.A. § 9-11-37 against a dog's co-owner due to the breeder's failure to comply with a court order to produce contracts with the breeder's other customers from over seven years earlier. There was no proof that such contracts existed, and even if they did, their relevance to the lawsuit was questionable. *Anderson v. Silver*, 300 Ga. App. 1, 684 S.E.2d 73 (2009), cert. denied, No. S10C0134, 2010 Ga. LEXIS 214 (Ga. 2010).

Dismissal without hearing on willfulness improper. — When a couple failed to attend their depositions, it was error to dismiss their personal injury case under O.C.G.A. § 9-11-37 without holding a hearing on the issue of willfulness; no motion to compel had been filed against the couple, no hearing of any type had been held previously, and the record would support a finding that the couple, who said later that they believed the depositions would be rescheduled because they were still in the process of obtaining counsel, had acted negligently, not willfully. *McConnell v. Wright*, 281 Ga. 868, 644 S.E.2d 111 (2007).

Jurisdiction of court for contempt purposes.

Under the look-through rule, a hypothetical coercive claim was the basis for federal jurisdiction over petitioner bank's Federal Arbitration Act petition, but petitioner payday loan companies' arbitration

petition was precluded by a related underlying state court judgment holding the companies in contempt and striking the companies' arbitration defenses under O.C.G.A. § 9-11-37(b)(2) to respondent borrower's suit alleging violations of Georgia's usury statute, O.C.G.A. § 7-4-1 et seq.; Georgia's Industrial Loan Act, O.C.G.A. § 7-3-1 et seq.; and Georgia's Racketeer Influenced and Corrupt Organizations statute, O.C.G.A. § 16-14-1 et seq. *Cnty. State Bank v. Strong*, 651 F.3d 1241 (11th Cir. 2011).

Striking arbitration defenses proper. — The defendants' discovery violations were willful when the defendants withheld certain documents in order to "test their position," and as the defendants had not sought a protective order under O.C.G.A. § 9-11-26, but instead violated the trial court's orders compelling discovery by withholding the documents they claimed were objectionable, their failure to comply with discovery orders was not excused; thus, it was a proper sanction under O.C.G.A. § 9-11-37 to strike the defendants' arbitration defenses. *Ga. Cash Am., Inc. v. Strong*, 286 Ga. App. 405, 649 S.E.2d 548 (2007), cert. denied, 2007 Ga. LEXIS 709 (Ga. 2007).

Payment of attorney's fees.

Because the trial court did not abuse

the court's discretion in denying an employee's motions to compel and for sanctions on the ground that the employee did not satisfy the good faith requirement of Ga. Unif. Super. Ct. R. 6.4(B), the award of attorney fees to an employer as authorized by O.C.G.A. § 9-11-37(4)(B) was not improper. *Phillips v. Selecto Sci.*, 308 Ga. App. 412, 707 S.E.2d 615 (2011).

Failure to Respond to Discovery Requests

Hearing required.

In a suit to confirm paternity and enforce child support payment, a trial court abused its discretion in imposing sanctions against the father under O.C.G.A. § 9-11-37(b)(2) for his alleged failure to comply with production requests because the trial court failed to provide the father an opportunity to be heard prior to imposing sanctions. *Harrell v. Ga. Dep't of Human Res.*, 300 Ga. App. 497, 685 S.E.2d 441 (2009).

Willful failure to appear at deposition.

In accord with *Washington v. South Ga. Medical Ctr.* See *King v. Board of Regents of Univ. Sys. of Ga.*, 238 Ga. App. 4, 516 S.E.2d 581 (1999).

ARTICLE 6

TRIALS

9-11-38. Right to jury trial.

JUDICIAL DECISIONS

Right to trial by jury not conferred in all cases.

Because the Seventh Amendment to the U.S. Constitution did not apply in state courts, and an insured's right to a jury trial thereunder was not infringed where genuine issues of material fact were lacking and disposition of the matter was best handled by way of summary judgment, the insured's Seventh Amendment right to a jury trial was not infringed; as a result, the insured failed to demonstrate any constitutional deprivation warranting a 42 U.S.C. § 1983 action. *Cuyler v. Allstate*

Ins. Co., 284 Ga. App. 409, 643 S.E.2d 783, cert. denied, 2007 Ga. LEXIS 510 (Ga. 2007).

Implicit waiver of right to jury trial. — In an auto dealer's suit against a car buyer, the buyer's waiver of the right to a jury trial under Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) and O.C.G.A. § 9-11-38 was implied by the buyer's failure to make a written demand for a jury trial or to object to the case being specially set for a bench trial at a hearing on the buyer's successful motion to vacate a judgment entered in favor of the dealer. *Cole v.*

ACR/Atlanta Car Remarketing, Inc., 295 Ga. App. 510, 672 S.E.2d 420 (2008).

Husband did not waive right to jury trial. — Trial court erroneously denied a husband's motion for a new trial and to set aside the decree of divorce, as the husband's actions in showing up 45 minutes late in answering a calendar call did not amount to either an expressed or implied waiver of an asserted right to a jury trial, and the husband did not expressly consent to a bench trial. *Walker v. Walker*, 280 Ga. 696, 631 S.E.2d 697 (2006).

Waiver of right to jury trial in contempt proceeding. — In a criminal contempt case, the trial court did not err in failing to submit the issue of financial inability to the jury because a business partner waived the partner's right to a jury trial on the issue of financial inability since the partner did not file a jury trial demand until after the evidentiary hear-

ing had commenced and the partner had previously requested that the contempt hearing be placed on a non-jury calendar; a litigant may impliedly waive the statutory right to a jury trial by his or her conduct. *Affatato v. Considine*, 305 Ga. App. 755, 700 S.E.2d 717 (2010).

Right to jury trial not infringed when no issue of material fact disputed. — Trial court did not violate a purchaser's right to a jury trial under the Georgia Constitution or O.C.G.A. § 9-11-38 by granting summary judgment to a lender because the right to a jury trial was not infringed when the jury would have no role since there were no issues of material fact in dispute. *Leone v. Green Tree Servicing, LLC*, 311 Ga. App. 702, 716 S.E.2d 720 (2011).

Cited in *Meacham v. Franklin-Heard County Water Auth.*, 302 Ga. App. 69, 690 S.E.2d 186 (2009).

9-11-39. Consent to trial by court; jury trial on court order.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CONSENT TO TRIAL WITHOUT JURY

General Consideration

Trial court authorized to strike jury trial demand from pleadings as sanction for refusal to participate in proceedings. — In a divorce proceeding, the trial court did not err in dismissing a husband's demand for a jury trial because the trial court was authorized to strike from the pleadings the husband's demand for a jury trial as a proper sanction for his willful refusal to participate in the proceedings; by his own admission, the husband deliberately chose not to attend the trial, and he presented no legitimate reason for that decision. *Kautter v. Kautter*, 286 Ga. 16, 685 S.E.2d 266 (2009).

Consent to Trial Without Jury

Consent to nonjury trial.

Trial court did not deprive a homeowner of due process by dismissing a claim for damages at the conclusion of a hearing because the homeowner voluntarily par-

ticipated in a consolidated non-jury hearing on the threshold issue of causation; there was a consensus among the trial court and the litigants that the homeowner's prayer for a permanent injunction and the claim for damages would both fail unless the homeowner could establish that a county water authority's underground water line was causing pressure waves and vibrations on the homeowner's property. *Meacham v. Franklin-Heard County Water Auth.*, 302 Ga. App. 69, 690 S.E.2d 186 (2009), cert. denied, No. S10C0865, 2010 Ga. LEXIS 427 (Ga. 2010).

Husband did not waive right to jury trial. — Trial court erroneously denied a husband's motion for a new trial and to set aside the decree of divorce, as the husband's actions in showing up 45 minutes late in answering a calendar call did not amount to either an expressed or implied waiver of an asserted right to a jury trial, and the husband did not expressly con-

sent to a bench trial. *Walker v. Walker*, 280 Ga. 696, 631 S.E.2d 697 (2006).

Waiver of right to jury trial in contempt proceeding. — In a criminal contempt case, the trial court did not err in failing to submit the issue of financial inability to the jury because a business partner waived the partner's right to a jury trial on the issue of financial inability since the partner did not file a jury trial demand until after the evidentiary hearing had commenced and the partner had previously requested that the contempt hearing be placed on a non-jury calendar;

a litigant may impliedly waive the statutory right to a jury trial by his or her conduct. *Affatato v. Considine*, 305 Ga. App. 755, 700 S.E.2d 717 (2010).

Withdrawal of jury trial waiver. — As the grant of a mistrial was an appropriate remedy for surprise at trial caused by new claims raised by the plaintiff, the trial court was authorized by O.C.G.A. § 9-11-39(b) to terminate the bench trial and to allow defendants to withdraw their jury waiver and demand a new trial by jury. *Griggs v. Fletcher*, 294 Ga. App. 60, 668 S.E.2d 521 (2008).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 15A Am. Jur. Pleading and Practice Forms, Judicial Sales, § 86.

9-11-40. Time and place of trial.

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ASSIGNMENT OF CASES FOR TRIAL

General Consideration

Reasonable notice required.

Trial court abused the court's discretion in denying a motion to set aside a default judgment entered when a builder failed to appear for trial in a breach of contract action; a nonamendable defect was shown on the face of the record, which established that the builder had never received actual notice of the trial as the notice was sent to the wrong address and was returned. *Moore v. Davidson*, 292 Ga. App. 57, 663 S.E.2d 766 (2008).

Trial court not required to provide notice of trial date. — Superior court did not abuse the court's discretion in denying a stepson's motion under O.C.G.A. § 9-11-60(d) to set aside a judgment entered in favor of an administrator based on the claim that the stepson's attorney had no notice of the trial date because the superior court placed the case on the trial calendar upon the stepson's request; therefore, pursuant to O.C.G.A.

§ 9-11-40(c)(2), the superior court was not required to provide the stepson with notice of the trial date, and the stepson's attorney had a duty to attend court and look after the attorney's and the stepson's interests. *Bocker v. Crisp*, 313 Ga. App. 585, 722 S.E.2d 186 (2012).

Time of Trial

Time for trial set by this section.

Upon reading the rules within the Civil Practice Act in para materia with Ga. Unif. Super. Ct. R. 24.6(B), the trial court was authorized to grant a divorce well after 30 days from the time an answer would have been due; hence, the trial court did not err in denying a wife's motion to set said judgment aside. *Hammack v. Hammack*, 281 Ga. 202, 635 S.E.2d 752 (2006).

Publication of trial calendar as notice.

Denial of motion to set aside a default judgment against a corporation was not

an abuse of discretion as the trial was properly noticed by publication of the trial calendar in the county's legal gazette; publication of a court calendar in the county's legal organ of record was sufficient notice to the parties to appear. *Migmar, Inc. v. Williams*, 281 Ga. App. 870, 637 S.E.2d 471 (2006).

Assignment of Cases for Trial

Notice held adequate.

Defendant's claim that sufficient notice

of the trial date was not provided was rejected as the record reflected that a scheduling order was issued by the trial court, the trial date was published on the trial calendar, and defendant and defendant's counsel were listed in the notice. It was clear that defendant was aware of the trial calendar based on an email from defendant's counsel. *Surles v. Cornell Corr. of Cal., Inc.*, 290 Ga. App. 260, 659 S.E.2d 683 (2008).

RESEARCH REFERENCES

ALR. — Pendency of criminal prosecution as ground for continuance or postponement of civil action involving facts or

transactions upon which prosecution is predicated — state cases, 37 ALR6th 511.

9-11-41. Dismissal of actions; recommencement within six months.

Law reviews. — For survey article on trial practice and procedure, see 59 *Mercer L. Rev.* 423 (2007). For survey article

on trial practice and procedure, see 60 *Mercer L. Rev.* 397 (2008).

JUDICIAL DECISIONS

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VOLUNTARY DISMISSAL

1. IN GENERAL
2. EFFECT OF PENDING COUNTERCLAIM
3. MULTIPLE DISMISSALS

INVOLUNTARY DISMISSAL

1. IN GENERAL
2. FOR FAILURE TO PROSECUTE
3. AFTER PRESENTATION OF PLAINTIFF'S EVIDENCE
4. EFFECT OF INVOLUNTARY DISMISSAL

AUTOMATIC DISMISSAL FOR WANT OF PROSECUTION

General Consideration

Invited error. — When a corporation sought to dismiss an administrator's wrongful death action because its caption bore the name of a nonexistent court, and the trial court later dismissed the action after the administrator filed a notice of voluntary dismissal, there was no basis for reversal; the trial court adopted the corporation's reasoning as a basis for dismissal and thus any error was invited by the corporation. *Video Warehouse, Inc. v.*

Newsome, 285 Ga. App. 786, 648 S.E.2d 124 (2007).

Attorney fee award after voluntary dismissal proper. — In awarding attorney fees to the appellees under O.C.G.A. §§ 9-11-37 and 9-15-14 after an appellant voluntarily dismissed the appellant's lawsuit, the trial court did not violate the legislative intent behind O.C.G.A. § 9-11-41(a). The appellees incurred needless expense because of the appellant's discovery violations, and the litigation was unnecessarily expanded prior to

the appellant's voluntary dismissal. *Hart v. Redmond Reg'l Med. Ctr.*, 300 Ga. App. 641, 686 S.E.2d 130 (2009).

Cited in *Southwest Health & Wellness, LLC v. Work*, 282 Ga. App. 619, 639 S.E.2d 570 (2006); *Jenkins v. Crea*, 289 Ga. App. 174, 656 S.E.2d 849 (2008); *GMC Group, Inc. v. Harsco Corp.*, 293 Ga. App. 707, 667 S.E.2d 916 (2008); *Vega v. La Movida, Inc.*, 294 Ga. App. 311, 670 S.E.2d 116 (2008); *Muskett v. Sketchley Cleaners, Inc.*, 297 Ga. App. 561, 677 S.E.2d 731 (2009); *Meacham v. Franklin-Heard County Water Auth.*, 302 Ga. App. 69, 690 S.E.2d 186 (2009); *Windsor v. City of Atlanta*, 287 Ga. 334, 695 S.E.2d 576 (2010); *Cnty. State Bank v. Strong*, 651 F.3d 1241 (11th Cir. 2011).

Voluntary Dismissal

1. In General

Construction with other law. — Upon a proper appeal from a final order, while neither O.C.G.A. § 24-9-67.1 nor O.C.G.A. § 9-11-16 required that a complaint be dismissed or stricken for failing to comply with the terms of those statutes, unlike the Anti-SLAPP statute, codified at O.C.G.A. § 9-11-11.1, because the trial court did not enter a final judgment within the meaning of O.C.G.A. § 9-11-68(b)(1), attorney fees were properly denied; moreover, as to the claim that dismissing and refiling in another court constitutes “improper judge shopping,” obtaining a different judge was simply the result of the action, not necessarily the reason for doing so. *McKesson Corp. v. Green*, 286 Ga. App. 110, 648 S.E.2d 457 (2007), cert. denied, 2007 Ga. LEXIS 656 (Ga. 2007).

A voluntary dismissal terminates the action.

Trial court lacked jurisdiction to hold a former employee in contempt for an alleged violation of a settlement agreement because the employee's former employer and a related entity had voluntarily dismissed their suit under O.C.G.A. § 9-11-41(a), which divested the trial court of jurisdiction and rendered null any subsequent trial court orders in the case. *Gallagher v. Fiderion Group, LLC*, 300 Ga. App. 434, 685 S.E.2d 387 (2009).

Order must be properly entered in record of court to toll five-year period. — As a jury selection notice sent by the trial court to the parties was not stamped by the clerk of court's office as “filed,” and there was nothing else in the record to show that the notice was properly entered in the records of the court, the jury selection notice did not meet the requirements for a written order that tolled the five-year dismissal period of O.C.G.A. § 9-11-41(e). Therefore, the trial court erred in denying the defendants' motion to dismiss. *Pilz v. Thibodeau*, 293 Ga. App. 532, 667 S.E.2d 622 (2008).

Voluntary dismissal not permitted after judgment announced.

A client's voluntary dismissal of the client's action against a magistrate judge for violation of the client's civil rights had no effect because prior to the client filing the voluntary dismissal, the trial court communicated the court's decision on the merits to the parties. *Wall v. Thurman*, 283 Ga. 533, 661 S.E.2d 549 (2008).

Dismissal prior to announcement of ruling adverse to plaintiff.

Although a plaintiff became aware through plaintiff's litigation opponent's counsel's email, which acknowledged that the trial court had asked the opponent to draft an order on the court's summary judgment motion, that the trial court was probably going to rule against the plaintiff, the plaintiff could still dismiss the plaintiff's claims without prejudice pursuant to O.C.G.A. § 9-11-41(a)(1)(A). The trial court had not actually indicated which way the court was going to rule. *First Media Group, Inc. v. Doe*, 312 Ga. App. 84, 717 S.E.2d 277 (2011).

Renewal of dismissed action.

Trial court correctly denied summary judgment to a corporation in an appellant's renewal action because the appellant was authorized to file a voluntary dismissal of the superior court appeal of a magistrate decision under O.C.G.A. § 9-11-41(a)(1)(A), which dismissed the appellant's case but did not dismiss the appeal, and because the renewal action was timely filed. *Long v. Greenwood Homes, Inc.*, 285 Ga. 560, 679 S.E.2d 712 (2009).

Court of appeals correctly reversed a

trial court's grant of summary judgment to a driver and a corporation based on a second driver's lack of diligence in serving the second driver's complaint in the second driver's voluntarily dismissed original action because the supreme court had previously held that inasmuch as diligence in perfecting service of process in an action properly refiled under O.C.G.A. § 9-2-61(a) had to be measured from the time of filing the renewed suit, any delay in service in a valid first action was not available as an affirmative defense in the renewal action; the first driver and corporation essentially sought the rewriting of an unambiguous statute, but their arguments were properly directed to the general assembly because when the general assembly wished to put a firm deadline on filing lawsuits, the legislature knew how to enact a statute of repose instead of a statute of limitation. *Robinson v. Boyd*, 288 Ga. 53, 701 S.E.2d 165 (2010).

O.C.G.A. § 9-11-41(a), the voluntary dismissal statute, could be exercised by either party in a de novo appeal filed in superior court following the entry of a judgment in magistrate court, regardless of which party appealed. Once a landlord filed the landlord's voluntary dismissal, the landlord was also entitled to file a renewal action pursuant to O.C.G.A. § 9-2-61(a). *Jessup v. Ray*, 311 Ga. App. 523, 716 S.E.2d 583 (2011).

Civil renewal provisions apply in habeas corpus proceedings. — O.C.G.A. § 9-14-42(c) was not a statute of repose and not an absolute bar to the refiling of a habeas corpus petition, and therefore, was not in conflict with the provisions of O.C.G.A. §§ 9-2-60(b) and (c) and 9-11-41(e), which allowed for the renewal of civil actions after dismissal. Therefore, the habeas court's dismissal of a petition as untimely was reversed. *Phagan v. State*, 287 Ga. 856, 700 S.E.2d 589 (2010).

2. Effect of Pending Counterclaim

Standing. — In a wrongful death suit by an administrator against a corporation and its alleged employee that was dismissed after the administrator filed a notice of voluntary dismissal, the corporation lacked standing to challenge the

dismissal of a counterclaim filed by the alleged employee since the corporation was not a party to the counterclaim. *Video Warehouse, Inc. v. Newsome*, 285 Ga. App. 786, 648 S.E.2d 124 (2007).

Dismissal on failure of defendant to object.

In an action involving a promissory note, a trial court improperly granted summary judgment to a bank on the bank's counterclaim because a borrower had voluntarily dismissed the action under O.C.G.A. § 9-11-41(a)(1)(A) a few days prior to the hearing on the summary judgment motion and the bank had not filed any objections to the dismissal; therefore, the dismissal terminated the entire action, and the bank could not go forward with the bank's counterclaim. *Mize v. First Citizens Bank & Trust Co.*, 297 Ga. App. 6, 676 S.E.2d 402 (2009).

Objection to dismissal.

After a review of the record on appeal, given that the defendant neither dismissed nor waived a compulsory counterclaim, but instead objected to the dismissal of the plaintiff's suit a little more than two weeks after receiving actual notice of the same, said counterclaim was preserved; thus, while the main action was properly dismissed, dismissal of the counterclaim was error. *Weaver v. Reed*, 282 Ga. App. 831, 640 S.E.2d 351 (2006).

Wholly derivative third party claims. — Order striking a notice of voluntary dismissal was reversed as when a corporation filed its notice of voluntary dismissal, no counterclaims or other claims seeking affirmative relief were pending against it; third-party claims did not seek affirmative relief from the corporation, so they could not be used to invoke the counterclaim limitation on voluntary dismissals. *Mariner Health Care, Inc. v. PricewaterhouseCoopers, LLP*, 282 Ga. App. 217, 638 S.E.2d 340 (2006), cert. denied, 2007 Ga. LEXIS 150 (Ga. 2007).

Pending motion for sanctions could not be used to prevent corporation from voluntarily dismissing action. — Corporation did not have prior knowledge that the action would be dismissed as requested in a limited liability partnership's motion for sanctions for alleged discovery abuses when the notice of volun-

tary dismissal was filed and the pending motion for sanctions was not a basis for invoking the counterclaim limitation on voluntary dismissals. *Mariner Health Care, Inc. v. PricewaterhouseCoopers, LLP*, 282 Ga. App. 217, 638 S.E.2d 340 (2006), cert. denied, 2007 Ga. LEXIS 150 (Ga. 2007).

Res judicata inapplicable. — Because a commercial landlord had dismissed its prior dispossession action against a tenant upon payment by the tenant pursuant to a settlement of the amount due and owing and such dismissal did not indicate that it was with prejudice, it was deemed without prejudice and was accordingly not an adjudication on the merits pursuant to O.C.G.A. § 9-11-41(a); accordingly, it was error for the trial court to have barred the landlord's claim for common area maintenance charges in the landlord's second action on the ground of *res judicata*, as the requirement of a previous adjudication on the merits of the claim was not met pursuant to O.C.G.A. § 9-12-40. *Rafizadeh v. KR Snellville, LLC*, 280 Ga. App. 613, 634 S.E.2d 406 (2006).

Right of voluntary dismissal to both parties. — It is apparent that O.C.G.A. § 9-11-41(c) simply extends the same right of voluntary dismissal afforded to plaintiffs by O.C.G.A. § 9-11-41(a) to parties that have filed counterclaims, cross-claims or third-party claims; so just as plaintiffs may voluntarily dismiss their actions, defendants filing counterclaims, cross-claims, and third-party claims can voluntarily dismiss their respective claims; nothing in the plain language of O.C.G.A. § 9-11-41(c) extends the counterclaim limitation to wholly derivative third-party claims for contribution or indemnification so that such claims can be used to bar a plaintiff's voluntary dismissal of its action. *Mariner Health Care, Inc. v. PricewaterhouseCoopers, LLP*, 282 Ga. App. 217, 638 S.E.2d 340 (2006), cert. denied, 2007 Ga. LEXIS 150 (Ga. 2007).

3. Multiple Dismissals

Only one of two prior dismissals was voluntary. — Because a plaintiff

initially filed a personal injury suit in state court, voluntarily dismissed that case and re-filed it in federal court, after which the federal court dismissed the federal claims asserted and refused to exercise jurisdiction over the state claims, resulting in their dismissal as well, there was only one voluntary dismissal, and the trial court's dismissal of the later re-filing in state court under O.C.G.A. § 9-11-41(a)(3) was error. *Troup v. Chambers*, 280 Ga. App. 392, 634 S.E.2d 191 (2006).

Second voluntary dismissal. — When plaintiff's first complaint was filed before July 1, 2003, the effective date of the amendment to O.C.G.A. § 9-11-41(a)(3), and the second and third complaints were filed after July 1, 2003, the 2003 amendment did not apply retroactively to make the voluntary dismissal of the second complaint act as an adjudication on the merits. *Davis v. Lugenbeel*, 283 Ga. App. 642, 642 S.E.2d 337 (2007), cert. denied, 2007 Ga. LEXIS 518 (Ga. 2007).

Trial court erred in dismissing a vehicle passenger's third complaint based on the amended O.C.G.A. § 9-11-41(a), which applied only to cases where the original complaint was filed on or after July 1, 2003. Because the first complaint was filed before July 1, 2003, the pre-amendment version of § 9-11-41(a) applied; accordingly, the passenger's second voluntary dismissal of the passenger's complaint did not operate as an adjudication on the merits. *Shy v. Faniel*, 292 Ga. App. 253, 663 S.E.2d 841 (2008).

A "renewal suit" filed by a limited liability company (LLC) and the company's manager against three corporations was properly dismissed under O.C.G.A. §§ 9-2-5(a) and 9-2-44(a), as the LLC and manager's prior and nearly identical suit against the corporation had been dismissed and an appeal was pending. However, the second dismissal should have been without prejudice under O.C.G.A. § 9-11-41(b) as the corporation's plea in abatement did not challenge the merits of that suit. *Sadi Holdings, LLC v. Lib Props., Ltd*, 293 Ga. App. 23, 666 S.E.2d 446 (2008).

Involuntary Dismissal

1. In General

Failure to comply with order of court.

When a trial court orders a plaintiff to make a more definite statement of his or her claims, the court should identify the ways in which the complaint fails to conform to the pleading requirements of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, and the court also should warn the plaintiff about the potential consequences of a failure to replead in a way that conforms to these requirements; if the court still cannot ascertain the nature of the claims that the plaintiff seeks to assert, the court may enter another order to replead again, but the trial court and the defendants need not become caught in an endless cycle of attempts to replead, and if it appears that a plaintiff is unable or unwilling to plead in conformance to the Civil Practice Act and the directions of the court, the court may be authorized in some cases to dismiss the complaint under O.C.G.A. § 9-11-41(b), not for a failure to state a claim, but for disregard of the rules and orders of the court. *Bush v. Bank of N.Y. Mellon*, 313 Ga. App. 84, 720 S.E.2d 370 (2011).

Trial court erred in granting defendant's motion to dismiss.

In the absence of an explicit order in an executor's renewal action, O.C.G.A. § 9-2-61(a), requiring the executor to identify the executor's expert witnesses by a date certain, the executor's failure to do so did not warrant the extreme sanction of dismissal under O.C.G.A. § 9-11-41. *Porter v. WellStar Health Sys.*, 299 Ga. App. 481, 683 S.E.2d 35 (2009), cert. denied, No. S09C2031, 2010 Ga. LEXIS 80 (Ga. 2010).

Involuntary dismissal erroneously denied. — Because it appeared from the testimony that a widow's standard of living was improved after receiving an award of year's support after the decedent's death, and that the widow had the resources independent of the year's support to afford those improvements, the award was erroneously entered; thus, the trial court erred in denying a motion for involuntary dismissal filed by the de-

cedent's only child. *Anderson v. Westmoreland*, 286 Ga. App. 561, 649 S.E.2d 820 (2007), cert. denied, 2007 Ga. LEXIS 676 (Ga. 2007).

Involuntary dismissal of declaratory action must be without prejudice. — Involuntary dismissal of a declaratory-judgment action for want of justiciability does not operate as an adjudication on the merits and is instead an issue of subject-matter jurisdiction. Accordingly, dismissal must be without prejudice. *Pinnacle Benning, LLC v. Clark Realty Capital, LLC*, No. A11A2408, 2012 Ga. App. LEXIS 247 (Mar. 6, 2012).

Motion for involuntary dismissal properly denied. — Superior court did not err in denying a land and development company's motion for involuntary dismissal pursuant to O.C.G.A. § 9-11-41(b) in a county's action under O.C.G.A. § 24-8-1 to establish a copy of an ordinance that had been lost because the superior court thoroughly reviewed the evidence upon which the court relied, including the testimony of the company's forensic expert and several witnesses who were county officials when the ordinance was enacted and their successors in office, as well as the dovetailing of subsequent amendments to the sections and subsections of the proffered copy; that evidence was sufficient to support the superior court's finding that the copy was a true and correct duplicate of the original ordinance adopted at the meeting of the county board of commissioners. *East Georgia Land & Dev. Co. v. Baker*, 286 Ga. 551, 690 S.E.2d 145 (2010).

2. For Failure to Prosecute

Failure to appear at hearing.

Attorney's motion to dismiss a contempt proceeding on grounds that no one physically appeared to present the charges was properly denied as Georgia law did not require anyone to prosecute a contempt action, the conduct charged already occurred and was of record, and a trial judge could make a finding of contempt *instanter*; the judge, sitting as the trier of fact and law in the proceeding, could review the evidence already in existence and make an order based thereon, and the attorney was free to present evidence in

mitigation. In re Scheib, 283 Ga. App. 328, 641 S.E.2d 570 (2007).

Courts without authority to dismiss with prejudice.

Because the court was unable to determine the trial court's grounds for granting a defendant's motion to dismiss with prejudice after the trial court announced during the hearing that the dismissal would be without prejudice, and appeared to indicate that the dismissal was for failure to prosecute, and because the court was unable to determine from the record whether that grant was error, remand was required for clarification. Wilken Invs., LLC v. Plamondon, 310 Ga. App. 146, 712 S.E.2d 576 (2011).

A dismissal of a complaint for want of prosecution was not an adjudication on the merits; thus, collateral estoppel and res judicata did not bar a subsequent complaint. Valdez v. R. Constr., Inc., 285 Ga. App. 373, 646 S.E.2d 329 (2007).

Involuntary dismissal upheld and presumption of regularity attached.

— Because an individual who filed a negligence action against a driver failed to show that the judge who dismissed that action for want of prosecution lacked the authority to do so because the judge was not assigned to the case, and also failed to establish any reversible error, a presumption of regularity attached to the court's order which the individual was unable to overcome. Ward v. Swartz, 285 Ga. App. 788, 648 S.E.2d 114 (2007).

Dismissal improperly granted.

— The trial court erroneously dismissed a litigant's petition for a writ of mandamus, and erroneously relied on dicta, in finding that orders setting a pre-trial conference in the underlying medical malpractice action were merely "housekeeping or administrative orders" that did not suspend the running of the five-year period under O.C.G.A. §§ 9-2-60(b) and 9-11-41(e). Instead, such orders tolled the running of the five-year rule if the orders were in writing, signed by the trial judge, and properly entered in the records of the trial court. Zepp v. Brannen, 283 Ga. 395, 658 S.E.2d 567 (2008).

3. After Presentation of Plaintiff's Evidence

Motion for involuntary dismissal properly denied. — In a bench trial, the court properly denied a title insurer's O.C.G.A. § 9-11-41(b) motions for involuntary dismissal at the close of the insureds' case and at the close of evidence as the insureds had offered sufficient evidence of the diminishment in value of the insureds' property in support of the insureds' breach of contract claim. Jimenez v. Chi. Title Ins. Co., 310 Ga. App. 9, 712 S.E.2d 531 (2011).

4. Effect of Involuntary Dismissal

Petition to modify child support adjudication on the merits. — Superior court erred in attempting to recast the court's dismissal of a husband's first petition for modification of child support as "simply a sanction" and not an adjudication on the merits so as to render the dismissal outside the ambit of O.C.G.A. § 19-6-15(k)(2) because in dismissing the husband's first petition for modification, the superior court did not specify that the order was not an adjudication on the merits, and under O.C.G.A. § 9-11-41(b), the order was a final order on the claim for downward modification of child support. Bagwell v. Bagwell, 290 Ga. 378, 721 S.E.2d 847 (2012).

Automatic Dismissal for Want of Prosecution

Notices of attorney's leaves of absences insufficient to avoid application of statute. — Pursuant to O.C.G.A. §§ 9-2-60(b) and 9-11-41(e), because an individual's negligence suit sat dormant when the trial court failed to enter any orders for eight years, the suit was automatically dismissed for want of prosecution, and the individual could not overcome application of those statutes as notices of leaves of absence filed by the individual's attorney were insufficient to avoid application. Ward v. Swartz, 285 Ga. App. 788, 648 S.E.2d 114 (2007).

No written order within five years resulted in dismissal. — Trial court

properly dismissed a party's counterclaim for failure to prosecute under O.C.G.A. §§ 9-2-60(b) and 9-11-41(e). It was undisputed that there had been no written order entered in the case for a period of over five years; even if there was evidence supporting the party's claim that the party had attempted to have the case placed on the trial calendar, the case the party relied upon had been reversed; and it had been held that the automatic dismissal statutes did not violate due process. *Roberts v. Eayrs*, 297 Ga. App. 821, 678 S.E.2d 535 (2009).

9-11-42. Consolidation; severance.

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Construction with O.C.G.A. § 9-11-20. — Because the numerous claims involving the various plaintiffs did not arise out of the same transaction, occurrence, or series of transactions or occurrences, but the claims were merely similar, involving common questions of law and fact, and thus could have been consolidated in accordance with O.C.G.A. § 9-11-42(a), the trial court erred in denying defendants' motion to sever said claims. *Lincoln Elec. Co. v. Gaither*, 286 Ga. App. 558, 649 S.E.2d 823 (2007).

Agreement through counsel to consolidate cases.

At a hearing on a motion for summary judgment in a declaratory judgment action brought by a beneficiary of a will, the executor's counsel acknowledged that the parties and issues between that case and the one filed by the executor were the same and agreed to the consolidation of the two cases. Counsel's agreement to the consolidation was sufficient to meet the consent requirement of O.C.G.A. § 9-11-42(a). *Bandy v. Henderson*, 284 Ga. 692, 670 S.E.2d 792 (2008).

Trial court did not err by consolidating brothers' action seeking to set aside quitclaim deeds their mother gave her daughter and grandson with a separate pending action in which the brothers sought to prove that a will the mother executed was invalid because the procedure the parties' agreed to did not amount to consolidation of the actions under O.C.G.A.

Action refiled more than six months after automatic dismissal was untimely.

As the plaintiff failed show that any action in the original suit filed, within the meanings of O.C.G.A. §§ 9-2-60 and 9-11-41(e), occurred to bar dismissal of the same, and failed to timely file a renewal action, the renewal action was properly dismissed. *Nelson v. Haugabrook*, 282 Ga. App. 399, 638 S.E.2d 840 (2006).

§ 9-11-42(a), and the daughter and grandson waived any claim that the actions were improperly consolidated without their consent; the daughter, grandson, and brothers entered into a consolidated pre-trial order, which controlled only the trial of the action seeking to invalidate the two quitclaim deeds, and on the day the trial commenced in that action, the trial court entered an order stating that although the court had technically consolidated the two actions, with the agreement of the parties and with the trial court's approval, the two civil actions would be tried separately with the action seeking to invalidate the quitclaim deeds being tried first by a jury and the action concerning the will to be tried later by the trial court sitting without a jury. *Schaffer v. Fox*, 303 Ga. App. 584, 693 S.E.2d 852 (2010).

Trial court did not err by consolidating a creditor's two cases under O.C.G.A. § 9-11-42 because the creditor not only consented, but the creditor actually requested the consolidation at a hearing regarding a discovery dispute; the fact that the creditor later rescinded the consent did not render erroneous the trial court's failure to separate the cases. *Thomas v. Brown*, 308 Ga. App. 514, 707 S.E.2d 900 (2011).

Discretion of trial judge.

Trial court's denial of a former supervisor's motion to sever a trial commenced by a former employee, alleging a variety of torts arising from the supervisor's alleged

improper touching of the employee, was not an abuse of discretion under O.C.G.A. § 9-11-42(b), as there was no showing that the supervisor's interest could not be adequately protected by a limiting instruction to the jury with respect to the liability of the former supervisor and the employer. *MARTA v. Mosley*, 280 Ga. App. 486, 634 S.E.2d 466 (2006).

Trial court did not err in denying a motion filed by owners of land to bifurcate a trespass action filed against them by a holder of an easement in light of the holder's failure to file a response to the motion; under O.C.G.A. § 9-11-42(b), whether to grant such a motion was a matter of discretion for the trial judge, the trial judge was not required to sever the trial solely because the owners requested it, and denial of the motion was not an abuse of discretion in that the parties' verified pleadings disputed the facts surrounding the holder's ownership, and the trial judge wished to resolve questions of fact regarding the easement's ownership. *Paine v. Nations*, 283 Ga. App. 167, 641 S.E.2d 180 (2006).

A trial court did not abuse its discretion by amending a pretrial order to allow for bifurcation of a trial, upon the motion of the defendants, because at the hearing on the motion to amend, the plaintiff never objected on the grounds that the timing of the motion to bifurcate caused any injustice; therefore, no reversible error occurred with regard to the plaintiff's timing argument. *Bolden v. Ruppenthal*, 286 Ga. App. 800, 650 S.E.2d 331 (2007), cert. denied, 2007 Ga. LEXIS 756 (Ga. 2007).

Trial court properly refused to transfer a dispossessory action wherein the landlord was granted a writ of possession from the county civil court to the superior court under O.C.G.A. § 15-10-45(d) based on the tenant filing a counterclaim as that statute only applied to magistrate courts, not the county civil court. Further, whether or not the trial court erred by failing to inquire as to whether the parties were willing to consent to consolidation of the claims could not be determined as the appealing tenant failed to provide a transcript of the bifurcated or dispossessory hearings. *Roberts v. Strong*, 293 Ga. App. 466, 667 S.E.2d 632 (2008).

Trial court was authorized to conclude, after extensive discussion with the parties, that bifurcation of an insured's breach of an insurance contract and bad faith failure to pay benefits claims was appropriate under O.C.G.A. § 9-11-42(b) because coverage turned on whether the insured's debilitating condition arose from an injury or sickness, and the discrete coverage issue had to be resolved first since bad faith was irrelevant absent coverage. *Saye v. Provident Life & Accident Ins. Co.*, 311 Ga. App. 74, 714 S.E.2d 614 (2011), cert. denied, No. S11C1857, 2011 Ga. LEXIS 984 (Ga. 2011).

Denial of severance proper. — In a divorce case in which the paramour of the husband became a named party because the husband allegedly fraudulently transferred assets to the paramour, the paramour was not entitled to severance of the fraudulent conveyances claim under O.C.G.A. § 9-11-42(b), as the paramour could not demonstrate the requisite harm by showing prejudice to the husband, and the paramour was not prejudiced by the joint trial because the fact of the paramour's affair with the husband would have been admissible in a separate trial. *Moore v. Moore*, 281 Ga. 81, 635 S.E.2d 107 (2006).

No application to motion for contempt. — O.C.G.A. § 9-11-42 did not apply to a party's motion for contempt because a motion for contempt was not an "action" within the meaning of the statute, and a trial court did not err in conducting a joint contempt hearing involving two parties without the consent of one of the parties. *Cook v. Smith*, 288 Ga. 409, 705 S.E.2d 847 (2010).

No consolidation of eminent domain proceedings. — It was undisputed that, although the condemnees were all related, the three parcels of property at issue were separately owned and differed in acreage. Thus, any consolidation would create an action involving distinct parties with distinct claims uniting against one party; therefore, O.C.G.A. § 9-11-42(a) applied and the condemnation petitions could not be consolidated without the company's consent. *Ga. Transmission Corp. v. Worley*, 312 Ga. App. 855, 720 S.E.2d 305 (2011).

9-11-43. Evidence.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

EVIDENCE ON MOTIONS

LAW OF OTHER JURISDICTIONS

General Consideration

Cited in *Cousins v. Maced. Baptist Church of Atlanta*, 283 Ga. 570, 662 S.E.2d 533 (2008).

Evidence on Motions

Consideration of affidavit in motion to dismiss. — In a breach of contract action between a business and an advertiser, while the best evidence rule required the advertiser to produce the first affidavit provided by the advertiser's senior director of business affairs, and the trial court erred in considering the affidavit without requiring the affidavit's production, given that the second affidavit showed that the parties entered into the contract at issue, which included the forum selection clause, the trial court properly considered the affidavit to that effect to support the advertiser's motion to dismiss on personal jurisdiction grounds. Consequently, when this second affidavit was not filed in violation of O.C.G.A. § 9-11-6(d), the trial court properly considered the second affidavit. *Alcatraz Media, LLC v. Yahoo! Inc.*, 290 Ga. App. 882, 660 S.E.2d 797 (2008).

Law of Other Jurisdictions

Responsibility on party wishing to raise foreign law issue.

Because a former president did not give adequate notice of the intention for Delaware law to apply to a corporation's misappropriation of corporate opportunity claim, the trial court did not err when it applied Georgia law; the president did not raise the issue of the applicability of Del-

aware law until a post-trial motion. *Brewer v. Insight Tech., Inc.*, 301 Ga. App. 694, 689 S.E.2d 330 (2009), cert. denied, No. S10C0678, 2010 Ga. LEXIS 455 (Ga. 2010).

Trial court did not err in applying Georgia law in a bank's action against a limited liability company (LLC) and guarantors for breach of a promissory note and guaranty agreements because the LLC and guarantors failed to give proper notice that the guarantors intended to raise an issue concerning Mississippi law pursuant to O.C.G.A. § 9-11-43(c); in their written response to the motion for summary judgment, the LLC and guarantors relied exclusively on Georgia law. *Kensington Partners, LLC v. Beal Bank Nev.*, 311 Ga. App. 196, 715 S.E.2d 491 (2011).

Pleading and proof requirement.

Georgia law applied in an action arising out of a Louisiana divorce decree because neither party met the requirements in O.C.G.A. §§ 9-11-43(c) and 24-7-24 that the parties give notice and thereafter prove the law of another state. *Davis v. Davis*, 310 Ga. App. 512, 713 S.E.2d 694 (2011).

Foreign law on common law marriages. — Wife's reliance on Alabama law to support her claim of a common law marriage was necessary because the *lex loci* is the general rule adhered to by courts in questions of marriage; Georgia, like other states not generally recognizing common law marriages, will recognize as valid a common law marriage established under the laws of another state. *Norman v. Ault*, 287 Ga. 324, 695 S.E.2d 633 (2010).

9-11-44. (Repealed effective January 1, 2013) Official records.

Editor's notes. — Ga. L. 2011, p. 99, § 11, provides for the repeal of this Code section effective January 1, 2013. For provisions of this Code section effective until that date, see the bound volume.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 repeal of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

9-11-45. Subpoena for taking depositions; objections; place of examination.

Law reviews. — For article, "Best Practices for Issuing Subpoenas Depositions of Georgia Residents in Cases Pend-

ing Out of State," see 12 Ga. St. B.J. 12 (2007).

JUDICIAL DECISIONS**Geographic limits in subsection (b) do not apply to parties.**

A motorist's suit was properly dismissed under O.C.G.A. § 9-11-37(d) due to the motorist's failure to attend three scheduled depositions. That defense counsel's office was located more than 30 miles from where the motorist resided did not excuse

the motorist from attending a properly noticed deposition, as the geographical limitations of O.C.G.A. § 9-11-45(b) were not applicable because a notice of deposition was issued under O.C.G.A. § 9-11-30 to a party in the lawsuit. *Pascal v. Prescod*, 296 Ga. App. 359, 674 S.E.2d 623 (2009).

ADVISORY OPINIONS OF THE STATE BAR

When subpoenas should issue. — Subpoena issued pursuant to O.C.G.A. § 24-10-22(a) should only be issued for actual hearings and trials and should not be requested when in fact no hearing or trial has been scheduled. Likewise, a subpoena issued pursuant to O.C.G.A. § 9-11-45 of the Civil Practice Act should be requested and issued only for depositions which have been actually scheduled by agreement between parties or when a notice of deposition has been filed and served upon all parties, and should not be issued when no deposition has been sched-

uled. Adv. Op. No. 84-40 (September 21, 1984).

Notice of deposition required. — O.C.G.A. § 9-11-45 provides that a subpoena shall issue for persons sought to be deposed and may command the person to produce documents. O.C.G.A. § 9-11-30(b)(1) requires notice to every other party of all depositions. Reading §§ 9-11-30 and 9-11-45 together, it is obvious that before a subpoena can be issued, notice of the deposition must be given to all parties. Adv. Op. No. 84-40 (September 21, 1984).

9-11-47. Jurors.**RESEARCH REFERENCES**

Am. Jur. Proof of Facts. — Jury Misconduct Warranting New Trial, 24 POF2d 633.

Challenges for Cause in Jury Selection Process, 58 POF3d 395.

ALR. — Prejudicial effect of juror misconduct arising from internet usage, 48 ALR6th 135.

9-11-49. Special verdicts.

Law reviews. — For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006).

JUDICIAL DECISIONS

Attack on verdict rejected upon failure to seek remedy under statute. — Verdict awarding general damages in a libel suit filed by an attorney against a former client, which showed that the client published facts intimating that the attorney bribed judges, contrary to O.C.G.A. § 16-10-2, was upheld, as: (1) the jury could reasonably conclude that the attorney was a limited public figure, and was properly charged on that status; (2) the client failed to seek any remedy regarding the verdict entered, including

submission of a verdict form per O.C.G.A. § 9-11-49; (3) the trial court did not err in prohibiting the client from offering testimony about corrupt individuals who were exposed as a result of the publication about the attorney; and (4) based on the evidence of the publication on the client's web site, neither a directed verdict or judgment notwithstanding the verdict in the client's favor was authorized. *Milum v. Banks*, 283 Ga. App. 864, 642 S.E.2d 892 (2007).

9-11-50. Motions for directed verdict and for judgment notwithstanding the verdict.

Law reviews. — For survey article on appellate practice and procedure, see 59 Mercer L. Rev. 21 (2007).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DIRECTED VERDICT

- 1. IN GENERAL
- 2. GROUNDS FOR DIRECTED VERDICT
- 3. TIME FOR MOTION

JUDGMENT NOTWITHSTANDING VERDICT

NEW TRIALS

General Consideration

Effect of waiver of objections. — Because a father waived any objections concerning the form of the verdict, the trial court did not abuse its discretion when it denied a motion for new trial on the father's claims for tortious interference and misappropriation of trade secrets asserted against the father's son; moreover, given the jury's decision not to award damages on said claims, the appeals court declined to consider the son's claim that the trial court erred in failing to grant motions for a directed verdict and

j.n.o.v. concerning them. *Lou Robustelli Mktg. Servs. v. Robustelli*, 286 Ga. App. 816, 650 S.E.2d 326 (2007).

Motion for directed verdict and j.n.o.v. erroneously denied on a breach of fiduciary duty claim as to a son's wife, who was not a corporate officer, director, or agent, and lacked the power to deal with third parties, including the creation of company obligations, without the son's approval, and the son was a corporate officer. *Lou Robustelli Mktg. Servs. v. Robustelli*, 286 Ga. App. 816, 650 S.E.2d 326 (2007).

In a personal injury action, the trial court erred by denying a manufacturer's motions for a directed verdict and judgment notwithstanding the verdict because the undisputed evidence demanded a finding that the injured party assumed the risk of injuries from driving a doorless off-road vehicle; the injured party testified that the injured party read the operator's manual and warnings posted on the vehicle. *Yamaha Motor Corp., U.S.A. v. McTaggart*, 313 Ga. App. 103, 720 S.E.2d 217 (2011).

Attorney's fees.

In a breach of contract action between a city and its general contractor arising out of a renovation project on property above and within an inert landfill, because the jury could find that the city acted in bad faith in its dealings with the general contractor on the issue of overhead costs, was stubbornly litigious, and caused the contractor unnecessary trouble and expense after the contractor encountered landfill materials within the depth of its excavation which caused it to have to halt work, it properly awarded attorney fees under O.C.G.A. § 13-6-11; thus, the city was properly denied a directed verdict and judgment notwithstanding the verdict as to this issue. *City of Lilburn v. Astra Group, Inc.*, 286 Ga. App. 568, 649 S.E.2d 813 (2007).

Evidence sufficient to withstand motions, etc.

Trial court did not err in denying property owners' motions for a directed verdict and for judgment notwithstanding the verdict in the owners' suit to prevent a limited liability company from replacing an existing sewer pipe with a larger one because a sewer-line easement authorized the removal and replacement of a malfunctioning or worn-out sewer pipeline, and there was some evidence that the existing pipe was not functioning properly and was worn out; moreover, there was evidence that the removal of the existing sewer pipe and replacement with either a six-inch or eight-inch pipe would not expand the physical boundaries of the easement. *Parris Props., LLC v. Nichols*, 305 Ga. App. 734, 700 S.E.2d 848 (2010).

Trial court did not err in denying property owners' motions for a directed verdict

and for judgment notwithstanding the verdict on a limited liability company's (LLC) counterclaim for conversion, which was predicated on the owners' disposal of pipe fixtures the LLC owned, because the evidence was sufficient to support the LLC's counterclaim for conversion; the owners exercised dominion and control over the pipe fixtures by having the fixtures removed from the owners' property and disposed of at a landfill, and even if the LLC acted wrongfully by depositing and storing the pipe fixtures on the owners' property, there was evidence that the owners failed to exercise due care in removing the expensive fixtures by having the fixtures dumped at a landfill with no consideration given as to the fixtures ultimate fate. *Parris Props., LLC v. Nichols*, 305 Ga. App. 734, 700 S.E.2d 848 (2010).

Trial court did not err in denying a driver's motion for directed verdict and motion for judgment notwithstanding the verdict on the amount of damages the jury awarded a decedent's estate for pain and suffering because the testimony of two eyewitnesses that the decedent was unconscious when the eyewitnesses saw the decedent immediately after the automobile accident was not necessarily inconsistent with the testimony of the officer who arrived at the scene and observed the decedent while a doctor was ministering to the decedent and talking to the decedent; because the trial court approved the verdict in denying the driver's post-trial motion, a presumption of correctness arose that would not be disturbed absent compelling evidence. *Park v. Nichols*, 307 Ga. App. 841, 706 S.E.2d 698 (2011).

Notice of appeal timely. — Commercial vehicle liability insurer's notice of appeal of an order denying the insurer's motion for directed verdict and judgment notwithstanding the verdict was timely under O.C.G.A. §§ 5-6-38 and 9-11-50(b) because the notice of appeal was filed within 30 days of the trial court's order on the insurer's motion for judgment notwithstanding the verdict, which the insurer filed within 30 days of the entry of the judgment. *Infinity Gen. Ins. Co. v. Litton*, 308 Ga. App. 497, 707 S.E.2d 885 (2011), cert. denied, No. S11C1110, 2011 Ga. LEXIS 580 (Ga. 2011).

No harm shown. — Although a trial court denied a property owner's motion for partial directed verdict on the issue of environmental contamination and damages in a condemnation proceeding by the Georgia Department of Transportation, as the jury was instructed not to consider that issue when determining the fair market value of the property there was no harm shown by the trial court's directed verdict ruling for purposes of the owner's appeal thereof. *H.D. McCondichie Props. v. Ga. DOT*, 280 Ga. App. 197, 633 S.E.2d 558 (2006).

Cited in *Flexible Prods. Co. v. Ervast*, 284 Ga. App. 178, 643 S.E.2d 560 (2007); *Arellano v. State*, 289 Ga. App. 148, 656 S.E.2d 264 (2008); *DeGolyer v. Green Tree Servicing, LLC*, 291 Ga. App. 444, 662 S.E.2d 141 (2008); *PricewaterhouseCoopers, LLP v. Bassett*, 293 Ga. App. 274, 666 S.E.2d 721 (2008); *Caswell v. Caswell*, 285 Ga. 277, 675 S.E.2d 19 (2009); *Renee Unlimited, Inc. v. City of Atlanta*, 301 Ga. App. 254, 687 S.E.2d 233 (2009); *Hewitt Assocs., LLC v. Rollins, Inc.*, 308 Ga. App. 848, 708 S.E.2d 697 (2011); *Toole v. Georgia-Pacific, LLC*, No. A10A2179, 2011 Ga. App. LEXIS 810 (Jan. 19, 2011); *Gospel Tabernacle Deliverance Church, Inc. v. From the Heart Church Ministries, Inc.*, 312 Ga. App. 355, 718 S.E.2d 575 (2011).

Directed Verdict

1. In General

Evidence.

In a tenant's action against the leasing agent of the tenant's apartment complex alleging that the tenant was injured by soot emitted from the apartment's heating system, the agent's motion for a directed verdict on the ground that the tenant did not show that the agent caused the soot to appear in the apartment was properly denied although there was evidence that the tenant smoked, burned candles, and painted the apartment; construed to favor the tenant, the theory that the agent's negligent maintenance caused the problem was substantiated by the opinion of the tenant's expert and by the facts that the problem began before the tenant painted the apartment, and that no resi-

due problems occurred in a subsequent apartment where the tenant also smoked and burned candles. *Ambling Mgmt. Co. v. Purdy*, 283 Ga. App. 21, 640 S.E.2d 620 (2006).

Trial court did not err in entering a directed verdict against a husband and wife, in their suit seeking uninsured motorist benefits, as they failed to prove negligence, and inferences of such provided by the wife's testimony amounted to mere conjecture, which was insufficient for a liability claim to attach. *Morton v. Horace Mann Ins. Co.*, 282 Ga. App. 734, 639 S.E.2d 352 (2006), cert. denied, 2007 Ga. LEXIS 201 (Ga. 2007).

Evidence did not demand verdict.

Evidence that a fire rescue emergency vehicle's lights were working properly at the time of an accident and testimony that the lights "were in compliance with Georgia law," was sufficient for a jury to have found that the lights were visible from a distance of 500 feet, in compliance with O.C.G.A. § 40-6-6 for purposes of allowing the vehicle to proceed through a red light; accordingly, a trial court properly denied a driver's motion for a directed verdict and judgment notwithstanding the verdict pursuant to O.C.G.A. § 9-11-50(a) arising from a collision that occurred at the intersection involving the driver's vehicle and the emergency vehicle. *Wynn v. City of Warner Robins*, 279 Ga. App. 42, 630 S.E.2d 574 (2006).

In a medical malpractice action, the trial court did not err in denying an original doctor a directed verdict on grounds that the negligence of either the patient or the patient's subsequent doctor cut off the original doctor's liability, as: (1) the patient was never put on notice of the need for any ongoing evaluation or treatment, and hence, any failure to seek routine medical care after the original doctor's misdiagnosis for over two years could not serve as the proximate cause of injury; (2) the acts or omissions of the subsequent doctor could not serve to cut off the liability of the original doctor; and (3) the jury was entitled to hear and resolve whether the subsequent doctor supplied an intervening cause of injury. *Amu v. Barnes*, 286 Ga. App. 725, 650 S.E.2d 288 (2007), aff'd, 283 Ga. 549, 662 S.E.2d 113 (2008).

A trial court did not err by denying a property owner's motion for a directed verdict on the issue of whether a power company had a duty to warn before opening dam flood gates in the property owner's negligence suit for flood damage as whether the power company had a duty to warn under Georgia tort law, as opposed to the power company's emergency action plan, was a matter for the jury. The property owner failed to cite a single appellate case in Georgia that required a dam owner or operator, as a matter of law, to notify downstream residents when opening flood gates and, the evidence on the issue was in conflict, thus, the matter did not demand a verdict in the property owner's favor. *Lee v. Ga. Power Co.*, 296 Ga. App. 719, 675 S.E.2d 465 (2009).

Trial court did not err in denying lessees' motions for directed verdict after a jury found in favor of a lessor in the lessor's action to recover the unpaid rent due on a commercial lease because there was sufficient evidence supporting the jury's verdict that the lease was not terminated and that the lessees owed the lessor for past due rent; the language used in the warranty deed transferring title to the property from the original landlord to a purchaser and the quitclaim deed transferring title to the property from the purchaser to the lessor could be read as an assignment of the lease, and the jury was authorized to conclude that the lessor did not force the lessees to vacate the premises when the purchaser hired a locksmith to change the locks on the premises since the lessees sent the lessor a letter stating that the lessees would be leaving the facility. *Level One Contact, Inc. v. BJL Enters., LLC*, 305 Ga. App. 78, 699 S.E.2d 89 (2010).

Alleged violation of statute presented a jury question. — Upon a claim that a pesticide company violated O.C.G.A. § 2-7-62(b)(3), given the multiple instructions included on the pesticide label, particularly that portion suggesting that the preparer reverse the order of the added components, the trial court properly concluded that the issue of whether the chemical was mixed in a manner inconsistent with its label was a jury question. Moreover, even if the company vio-

lated § 2-7-62(b)(3), it did not entitle the plaintiff to judgment as a matter of law, as it would improperly remove the issue of proximate cause from the jury. *Chancey v. Peachtree Pest Control Co.*, 288 Ga. App. 767, 655 S.E.2d 228 (2007), cert. denied, 2008 Ga. LEXIS 459 (Ga. 2008).

New trial.

While the failure to move for a directed verdict barred a party from contending on appeal that said party was entitled to a judgment as a matter of law because of insufficient evidence, such did not bar that part from arguing their entitlement to a new trial on that ground, as fairness dictated that a party who has failed to move for a directed verdict at trial should not be able to obtain a judgment as a matter of law on appeal based on the contention the evidence was insufficient to support the verdict. *Aldworth Co. v. England*, 281 Ga. 197, 637 S.E.2d 198 (2006).

Directed verdict proper. — In a medical malpractice action, an executrix failed to support a claim for punitive damages related to a claim of abandonment, as the executrix failed to present any expert testimony that there was a reasonable degree of medical certainty the decedent would have survived, even if the doctor or another qualified surgeon had been at the hospital when the decedent began to bleed internally; thus, the trial court properly granted the doctor a directed verdict as to both claims. *King v. Zakaria*, 280 Ga. App. 570, 634 S.E.2d 444 (2006).

In a breach of contract action associated with a construction project, the trial court properly granted a limited liability company's motion for a directed verdict against a contractor, as the contractor failed to present sufficient evidence linking the limited liability company to the contract sued upon, but all the evidence involved the contractor's negotiations and dealings with a businessperson and the businessperson's company. *L. Lowe & Co., Inc. v. Sunset Strip Props., LLC*, 283 Ga. App. 357, 641 S.E.2d 797 (2007).

Trial court did not err in directing a verdict as to a parent's ordinary negligence claim based on a hospital's decision to not follow the recommended protocol for testing the parent's newborn blood. The hospital had to exercise medical judgment

to determine what to do to treat the child and assess the seriousness of the diseases tested for. *Walls v. Sumter Reg'l Hosp., Inc.*, 292 Ga. App. 865, 666 S.E.2d 66 (2008).

Since the first subsidiary company undertook no contractual obligation to perform work on the project for another, but merely hired the contractor to perform the project work, the first company was not a statutory employer liable for compensation to the injured employee under O.C.G.A. § 34-9-8, and had no immunity from suit under O.C.G.A. § 34-9-11. Therefore, the first company was entitled to a directed verdict in the company's favor on the basis that the company was a statutory employer under § 34-9-8, and was therefore entitled to Workers' Compensation immunity from suit under § 34-9-11. *Ramcke v. Ga. Power Co.*, 306 Ga. App. 736, 703 S.E.2d 13 (2010), cert. denied, No. S11C0482, 2011 Ga. LEXIS 583 (Ga. 2011).

Truck repairer's failures to repair an owner's truck to the owner's satisfaction or to agree on a trade-in price for the truck could not have justified the submission of attorney fees to the jury pursuant to O.C.G.A. § 13-6-11, such that the trial court properly granted a directed verdict under O.C.G.A. § 9-11-50 to the repairer. *Puckette v. John Bailey Pontiac-Buick-GMC Truck, Inc.*, 311 Ga. App. 138, 714 S.E.2d 750 (2011).

Directed verdict proper where contract unenforceable as a matter of law. — In a potential home purchaser's action to recover earnest money, the seller was entitled to a directed verdict under O.C.G.A. § 9-11-50(a) on the basis that the contract was unenforceable because the contract did not list the loan amount or the interest rate on the loan; however, because the contract was unenforceable, the purchaser was not estopped from recovering the earnest money. *Parks v. Thompson Builders, Inc.*, 296 Ga. App. 704, 675 S.E.2d 583 (2009).

Appellate review of denial of motion for directed verdict.

In an action involving the sale of land, because no adequate description of the property sought to be sold could be found within the four corners of the parties' final

agreement, no exhibits were attached, and the words used in the contract did not provide a sufficient description of the land, the trial court erred in admitting parol evidence to provide a legally sufficient description of the property at issue; hence, the property owners' motion for a directed verdict was erroneously denied. *McClung v. Atlanta Real Estate Acquisitions, LLC*, 282 Ga. App. 759, 639 S.E.2d 331 (2006).

Appellate review of grant of motion for directed verdict.

Husband's complaint of the trial court's denial of the corporation's motion for summary judgment under O.C.G.A. § 9-11-56 was moot as the trial court later granted the corporation's motion for a directed verdict under O.C.G.A. § 9-11-50. *Moore v. Moore*, 281 Ga. 81, 635 S.E.2d 107 (2006).

Abandoned claims not addressed on appeal. — On appeal from a directed verdict entered against them, because the landowners did not specifically challenge the trial court's ruling as to the denial of their claim for attorney fees and punitive damages, absent evidence of any error resulting from that ruling, to the extent they intended to challenge the directed verdict as to these two claims, that challenge was abandoned. *Walls v. Moreland Altobelli Assocs.*, 290 Ga. App. 199, 659 S.E.2d 418 (2008).

Trial court did not err in denying motion for directed verdict.

Trial court properly denied both a motion for directed verdict and a motion for judgment notwithstanding the verdict based on the claim by a dentist and a dental center that a former employee had failed to present evidence on the employee's claim of intentional infliction of emotional distress that the dentist's actions in harassing the employee were extreme and outrageous or that the emotional distress suffered by the employee was severe; the evidence of the dentist's pervasive pattern of harassing behavior demonstrated the extreme and outrageous nature of the dentist's conduct, and the severity of the emotional distress suffered by the employee was evidenced by the fact that the employee became so fearful of the dentist that the employee obtained a gun and

kept the gun under the employee's bed until the employee moved out of state. Furthermore, the former employee's claim of negligent hiring and retention of the dentist were well grounded because the former employee presented evidence that officers of the dental center knew, based on allegations that the dentist had previously harassed other employees of the dental center, that the dentist posed a risk of also harassing the former employee and additional motions for directed verdict and judgment notwithstanding the verdict were properly denied. *Ferman v. Bailey*, 292 Ga. App. 288, 664 S.E.2d 285 (2008).

Trial court erred in denying directed verdict.

Trial court erred in denying motions for directed verdict, O.C.G.A. § 9-11-50, because a real estate broker and a real estate agent owed no duty to a potential buyer of property where the buyer did not engage the broker as defined in the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq.; the buyer was, at most, a "customer" of the broker pursuant to O.C.G.A. § 10-6A-3(8), and the broker exercised reasonable care in locating a property owner and checking on the status of desired property pursuant to § 10-6A-3. *Harrouk v. Fierman*, 291 Ga. App. 818, 662 S.E.2d 892 (2008).

It was error not to direct a verdict pursuant to O.C.G.A. § 9-11-50(a) to a putative property owner in an action by various family members, seeking to impose a constructive trust on real property under former O.C.G.A. § 53-12-93(a), as it was inequitable to grant the family members an interest in the property because the putative owner had worked the farm on it for over 18 years and had spent significant sums on the property compared to the very minimal amounts contributed by the family members over the years; the doctrine of part performance as an exception to the Statute of Frauds under O.C.G.A. § 13-5-31(3) was inapplicable because the oral agreement was not sufficiently certain or definite for purposes of enforcement. *Troutman v. Troutman*, 297 Ga. App. 62, 676 S.E.2d 787 (2009).

Trial court erred in directing a ver-

dict, etc.

Evidence presented by a testator's child, which proved the testator's disease, medication, and its effects, the testator's dependence on the care givers, their isolation of the testator from the child; their active encouragement and arrangements for the drafting and execution of a new will, the testator's short-term relationship with them, the testator's sporadic contact with and lack of trust towards one of the challenged beneficiaries, and the testator's long-standing expressions of testamentary intent to leave all of the testator's property to the child, which the testator repeated the day after execution of the disposition, supplied sufficient evidence to support the child's claim of undue influence to support the jury verdict in the child's favor and not a directed verdict entered by the trial court in the face of this evidence; although this evidence did not demand a finding that the will was the product of undue influence, it was sufficient to authorize the submission of that question to the jury. *Bailey v. Edmundson*, 280 Ga. 528, 630 S.E.2d 396 (2006).

Directed verdict on a breach of contract claim involving a promissory note was inappropriate because although the amount due was admittedly not paid, fraud and misrepresentation by plaintiffs, a corporation and the corporation's principal, were defenses to that claim; because the evidence presented to support a fraud defense by defendants, a corporation and two guarantors, also supported defendants' counterclaims, the error in granting the directed verdict was not harmless as the jury could have been influenced by that action in determining the viability of the counterclaims. *Jocelyn Canyon, Inc. v. Lentjes*, 292 Ga. App. 608, 664 S.E.2d 908 (2008).

In a homeowner's breach of contract and negligent construction case, because there was no indication in the record that the trial court determined cost of repair to be an inappropriate measure of damages and because the homeowner presented some evidence of the cost to repair fire damage, the trial court erred in directing a verdict against the homeowner. *John Thurmond & Assocs. v. Kennedy*, 284 Ga. 469, 668 S.E.2d 666 (2008).

Directed verdict in competency trial. — Trial court did not err in denying

the defendant's motion for a directed verdict under O.C.G.A. § 9-11-50 in the defendant's competency trial because the evidence on competency was in conflict; even though the defendant's expert witness opined that the defendant was not competent to stand trial, the state's expert testified that the defendant was competent to do so. *Smith v. State*, 312 Ga. App. 174, 718 S.E.2d 43 (2011).

Motion made after case submitted to the jury was untimely. — When a carrier did not file a motion for a directed verdict until after the case had been submitted to the jury, it was untimely under O.C.G.A. § 9-11-50. Furthermore, the untimely motion also barred the carrier from contending on appeal that it was entitled to judgment as a matter of law because of insufficient evidence. *Ga. Farm Bureau Mut. Ins. Co. v. Hyers*, 291 Ga. App. 316, 661 S.E.2d 682 (2008).

2. Grounds for Directed Verdict

When directed verdict proper.

In a tenant's action against the leasing agent of an apartment complex alleging injury caused by soot emitted from the apartment's heating system, a motion for a directed verdict filed by the agent that claimed that the tenant failed to exercise ordinary care for the tenant's her personal safety and assumed the risk of being exposed to a hazardous condition was properly denied; construed to favor the tenant, the evidence did not mandate a finding that the tenant knew, or in the exercise of ordinary care, should have known of an intentional and unreasonable exposure to a hazard, or that the tenant had actual knowledge of the danger and knew of a specific, particular risk of harm associated with conditions in the apartment. *Ambling Mgmt. Co. v. Purdy*, 283 Ga. App. 21, 640 S.E.2d 620 (2006).

Tenant's action against the leasing agent of the tenant's apartment complex alleging that the tenant was injured over a period of almost three years by soot emitted from the apartment's heating system was not time-barred by O.C.G.A. § 9-3-33 because the continuing tort theory tolled the running of the statute of limitations to within two years before the action was filed; because there was evi-

dence that the tenant's exposure to the hazard was not eliminated more than two years before the action was filed, the agent's motion for a directed verdict on that ground was properly denied. *Ambling Mgmt. Co. v. Purdy*, 283 Ga. App. 21, 640 S.E.2d 620 (2006).

In a contractor's quantum meruit action, a former high school baseball coach was erroneously denied a directed verdict, as the evidence showed that although the contractor rendered a valuable service to a school by building an indoor baseball hitting facility, when the school board, and not the coach, accepted those services to create an implied promise of payment, quantum meruit payment for construction of the facility could not lie against the coach; moreover, because there was no implied agreement requiring the coach to pay for the hitting facility, the contractor's argument that the coach was liable for having received a personal benefit from the construction of the hitting facility went to the question of unjust enrichment, and not quantum meruit. *Brown v. Penland Constr. Co.*, 281 Ga. 625, 641 S.E.2d 522 (2007).

In an action premised on allegations of a breach of a land sales contract between a group of sellers and an investor, because testimony regarding the sale of an identical parcel at a different price and time failed to establish as a matter of law the precise market value as of the date of the breach, the trial court erred in denying the third seller's motion for directed verdict or JNOV. *Dunn v. Venture Bldg. Group, Inc.*, 283 Ga. App. 500, 642 S.E.2d 156 (2007).

A decedent's parents and the administrator of the decedent's estate failed to present evidence showing the proximate cause element for a medical malpractice claim; the lack of continuous monitoring at a hospital was too remote as a matter of law to be the proximate cause of the decedent's suicide approximately 335 miles away in another state, and thus the trial court properly directed a verdict for the hospitals and physicians. *Miranda v. Fulton DeKalb Hosp. Auth.*, 284 Ga. App. 203, 644 S.E.2d 164 (2007), cert. denied, 2007 Ga. LEXIS 516 (Ga. 2007).

Absent evidence that a criminal prose-

cution for check fraud filed against a car buyer was terminated in the car buyer's favor, showing instead that the action against the car buyer remained pending, the trial court properly granted a directed verdict on the car buyer's malicious prosecution claim in favor of a car dealer and two of its employees. *Heflin v. Goodman*, 288 Ga. App. 454, 654 S.E.2d 417 (2007), cert. denied, 2008 Ga. LEXIS 409 (Ga. 2008).

Directed verdicts in favor of defendants in a Georgia corporation's claims for tortious interference with business relations were proper as the assertion that the corporation was affiliated with an Alabama corporation and had a business relationship with the Alabama corporation's customers disregarded the legal significance of the undisputed fact that the Georgia corporation and the Alabama corporation were each a corporation. *All Star, Inc. v. Fellows*, 297 Ga. App. 142, 676 S.E.2d 808 (2009).

Trial court did not err in entering a judgment in favor of a church in the church's action against an adjoining landowner to establish a boundary line between their properties because the evidence the landowners presented to support the landowners' claimed boundary line was too vague and indefinite to allow any recovery, and the evidence demanded a judgment for the church with regard to the boundary line established in a survey. *Spivey v. Smith*, 303 Ga. App. 469, 693 S.E.2d 830 (2010).

Directed verdict in medical malpractice case appropriate. — In a medical malpractice action arising from an alleged mismanagement of an obstetrical complication during the birth of the patient's child, absent any record evidence of causation, the inapplicability of the doctrine of *res ipsa loquitur*, and given that the trial court did not err in the court's evidentiary rulings against the patient, the trial court properly granted a directed verdict to the doctor sued. *Hawkins v. OB-GYN Assocs., P.A.*, 290 Ga. App. 892, 660 S.E.2d 835 (2008), cert. denied, 2008 Ga. LEXIS 713 (Ga. 2008).

Directed verdict when no evidence of future medical expenses. — Trial court erred in failing to grant a defending

driver's motion for a directed verdict under O.C.G.A. § 9-11-50(e) as to the plaintiff driver's damages for future medical expenses because the plaintiff presented no evidence from which it could be inferred that the plaintiff would have future medical expenses nor, if the plaintiff did, the amount thereof. *Bennett v. Moore*, 312 Ga. App. 445, 718 S.E.2d 311 (2011), cert. denied, 2012 Ga. LEXIS 317 (Ga. 2012).

Directed verdict is authorized, etc.

In a pedestrian's personal injury action, because a jury question existed as to whether a cab service's employee was acting within the scope of the employee's employment at the time of the accident which struck the pedestrian, a directed verdict in favor of the cab service was properly denied. *Decatur's Best Taxi Serv., Inc. v. Smith*, 282 Ga. App. 731, 639 S.E.2d 482 (2006).

Evidence insufficient to support verdict for plaintiff.

As evidence existed to support claims of fraud, conspiracy to commit the same, and conversion, alleged by a group of investors against a company and its fundraisers regarding a patent the fundraisers convinced the investors to support, the trial court did not err in granting the investors a directed verdict; moreover, the fraud claims were not dependent on the characterization of the investments as either debt or equity. *Argentum Int'l, LLC v. Woods*, 280 Ga. App. 440, 634 S.E.2d 195 (2006).

In a divorce, the trial court did not err in granting a directed verdict under O.C.G.A. § 9-11-50 in the wife's claim of fraudulent conveyances; because the wife failed to present any evidence from which the jury could have reasonably inferred that a specific conveyance from the husband to the corporation was fraudulent, there was no conflict in the evidence as to any material issue, and the evidence, with all reasonable deductions therefrom, demanded a verdict in favor of the corporation. *Moore v. Moore*, 281 Ga. 81, 635 S.E.2d 107 (2006).

When directed verdict not proper.

Trial court did not err in denying the niece's motion for directed verdict under O.C.G.A. § 9-11-50(a), as some evidence supported the finding that the deed nam-

ing the niece as grantee was never delivered to the niece as required under O.C.G.A. § 44-5-30; there was evidence that the original deed was found in the decedent's safe deposit box and that the key to the box had been in the decedent's control when the decedent died. *Robinson v. Williams*, 280 Ga. 877, 635 S.E.2d 120 (2006).

In a tenant's action against the leasing agent of an apartment complex alleging that soot from an apartment heating system caused the tenant to suffer respiratory and lymph node problems, the agent's motion for a directed verdict was properly granted on the tenant's claim for punitive damages under O.C.G.A. § 51-12-5.1(b); the tenant failed to present clear and convincing evidence of a conscious indifference to consequences authorizing the imposition of punitive damages because it was not shown that the tenant knew or should have known that prolonged exposure to the soot would cause the personal injury for which the tenant sought recovery. *Ambling Mgmt. Co. v. Purdy*, 283 Ga. App. 21, 640 S.E.2d 620 (2006).

In a personal injury action, because a fact issue was presented as to whether, at the time of the incident, a partnership's employee was within the scope of employment at the time a pedestrian was injured, and the jury was properly charged on this issue, the pedestrian was properly denied a directed verdict. *Marwede v. EQR/Lincoln L.P.*, 284 Ga. App. 404, 643 S.E.2d 766 (2007), cert. denied, 2007 Ga. LEXIS 504 (Ga. 2007).

Given evidence that the father performed part of the agreement at issue with a son for the latter to transfer title to a house, specifically by selling the father's house and paying the son the proceeds in exchange for the son's promise to convey, when the son failed to convey the house the trial court properly granted the father a constructive trust based on fraud, denied the son a directed verdict, and sustained the jury's verdict. *Perry v. Perry*, 285 Ga. App. 892, 648 S.E.2d 193 (2007).

The trial court did not err in denying a boyfriend a directed verdict on a fraud in the inducement claim asserted by the boyfriend's girlfriend, given evidence of the personal nature of their relationship

which caused the girlfriend to place trust and confidence in the boyfriend's repeated promises of marriage and believe that the boyfriend was acting in the girlfriend's best interest by taking the monies loaned to use for a business, which would ultimately allow the boyfriend to repay the girlfriend and support them after they were married. *Tankersley v. Barker*, 286 Ga. App. 788, 651 S.E.2d 435 (2007), cert. denied, 2007 Ga. LEXIS 742 (Ga. 2007).

Trial court did not err in failing to direct a verdict for a vehicle manufacturer in a failure to warn action due to lack of causation evidence as representatives of victims who died as a result of an accident involving the van provided evidence to support the causation element by showing that the van had a high center of gravity and lacked stability when fully loaded, and that the driver would not have operated the van if there had been a warning about the instability. *Bagnell v. Ford Motor Co.*, 297 Ga. App. 835, 678 S.E.2d 489 (2009).

Contradictory testimony of litigant.

Because there was no conflict in the evidence as to the issue of an insured's receipt of an umbrella policy, the trial court did not err in directing a verdict in favor of an insurer as to that policy; the insured's testimony that the insured could not say if the insured had read the policy because the insured did not know if the insured had received the policy contradicted the insured's earlier testimony that the insured had actually scanned the policy. *Gov't Emples. Ins. Co. v. Kralick*, 313 Ga. App. 492, 722 S.E.2d 107 (2012).

Direction of verdict on liability issue.

Dog-bite victim sued the dog's owners, alleging the owners failed to warn the victim of the dog's vicious tendencies. As there was no evidence the dog had ever previously bitten or attacked anyone, and an owner's alleged statement that children would not "have to worry about getting bit" if the children stayed away from the owner's truck, where the dog was chained in the truck bed, was insufficient to establish the owners' knowledge of the dog's vicious propensity; thus, the owners were properly granted a directed verdict

on this claim. *Huff v. Dyer*, 297 Ga. App. 761, 678 S.E.2d 206 (2009).

Directed verdict proper where issue of ownership previously decided.

The trial court properly directed a verdict in favor of an engineering firm on the landowners' claims relating to the landowner's standing water and drainage issues because regardless of whether these claims sounded in nuisance, trespass, or negligence, causation was a central element which the landowners failed to support with any evidence. Further, the mere fact that one event chronologically followed another was alone insufficient to establish a causal relation between the events. *Walls v. Moreland Altobelli Assocs.*, 290 Ga. App. 199, 659 S.E.2d 418 (2008).

Evidence supporting damages.

Trial court erred in failing to order a new trial on the issue of damages after the court granted a directed verdict in favor of a church in the church's action against an adjoining landowner to establish a boundary line between their properties because when the trial court entered the judgment for the church the court should have also refused to enter judgment on the damages portion of the jury's verdict and should have granted a new trial to the church on the issue of damages; if any evidence supported the jury's award in favor of the landowner, then the jury's award of no damages to the church would have been correct. *Spivey v. Smith*, 303 Ga. App. 469, 693 S.E.2d 830 (2010).

Directed verdict held proper.

In an action filed by a bank to recover on a promissory note, as well as to recover on the guaranty tied to that note, the trial court properly granted a directed verdict to the bank, and against both the debtor and the guarantor, as the bank made out the bank's prima facie case by showing that the note was executed and the debtor remained liable thereunder; moreover, the guaranty's broad language obligated the guarantor to the bank, and no issue of fact existed as to whether the guarantor was discharged by any increased risk or any purported novation. *Fielbon Dev. Co. v. Colony Bank*, 290 Ga. App. 847, 660 S.E.2d 801 (2008).

Trial court did not err in granting de-

fendants' motion for a directed verdict as a child who drowned in an apartment complex swimming pool was capable of appreciating the risk associated with swimming in the pool, and the child's parent explicitly instructed the child to stay out of the deep end of a pool and never to swim without adult supervision. *Rice v. Oaks Investors II*, 292 Ga. App. 692, 666 S.E.2d 63 (2008), cert. denied, 2008 Ga. LEXIS 963 (Ga. 2008).

In a case involving a home buyer's fraudulent conveyance and negligent construction claims against a corporation, given the buyer's failure to present required evidence on the buyer's attorney fee claim under O.C.G.A. § 13-6-11, there was no error in the trial court's refusal to submit the issue to the jury and in directing a verdict on this claim. *Sims v. GT Architecture Contrs. Corp.*, 292 Ga. App. 94, 663 S.E.2d 797 (2008).

Evidence that a dog might have previously harmed a small kitten and puppy did not indicate that the owner had any reason to suspect the dog had a propensity to bite, and was properly excluded. Absent evidence that the dog had any known vicious tendency, the trial court did not abuse its discretion in directing a verdict for the dog owner. *Kringle v. Elliott*, 301 Ga. App. 1, 686 S.E.2d 665 (2009).

Directed verdict held improper.

In a suit seeking recovery for injuries sustained in a vehicular collision, a directed verdict under O.C.G.A. § 9-11-50(a) was erroneous because cross-examination testimony of a treating doctor created a disputed factual issue as to whether all of the medical expenses were caused by the collision, and thus, this issue should have been presented to the jury. *Allen v. Spiker*, 301 Ga. App. 893, 689 S.E.2d 326 (2009), cert. denied, No. S10C0740, 2010 Ga. LEXIS 454 (Ga. 2010).

Directed verdict properly denied.

Because the testimony by the insured's daughter as to how the purchase price of the items contained on an inventory of the personal property lost in a fire was calculated, all of which were common household goods, coupled with the proof of loss form showing a depreciated value, was sufficient to uphold the monetary judg-

ment entered, the insurer's motion for a directed verdict on this issue was properly denied. Moreover, the decedent-insured had already submitted a discounted actual cash value in the proof of loss form, the form was timely submitted to the insurer, and it also was admitted at trial absent any objection. *Allstate Indem. Co. v. Payton*, 289 Ga. App. 202, 656 S.E.2d 554 (2008).

A trial court correctly denied an executor's motion for directed verdict in an action wherein the child of the testator filed a caveat and objection to the probate of the testator's last will and testament on the grounds that the will was the product of undue influence as sufficient evidence existed to support the conclusion that undue influence was used to have the testator bequeath the only asset, namely a home, to the caregiver who was hired by the executor. The record established that the executor blocked calls from the testator's child, refused to let the child see the testator, and a confidential relationship was established between the caregiver and the testator as the caregiver took an active role in the planning, preparation, and execution of the will. *Bean v. Wilson*, 283 Ga. 511, 661 S.E.2d 518 (2008).

Since the bar allowed combative patrons to remain on the premises for an inordinate amount of time until a patron's foreseeable and permanent injury occurred during a fight, the denial of a motion for a directed verdict by the bar and the bar's owner in the patron's personal injury action was proper. *Mulligan's Bar & Grill v. Stanfield*, 294 Ga. App. 250, 668 S.E.2d 874 (2008), cert. denied, No. S09C0351, 2009 Ga. LEXIS 192 (Ga. 2009).

Trial court properly denied a home remodeling company's motion for a directed verdict on a buyer's breach of home warranty claim as there was evidence that, contrary to the remodeler's assertions, it had waived the formal notice of defects requirements in a purchase agreement, and the ultimate determination of waiver was a jury question. *RHL Props., LLC v. Neese*, 293 Ga. App. 838, 668 S.E.2d 828 (2008).

Dog-bite victim sued the dog's owners, asserting a claim of negligence per se. As

the dog had not been running at large, and the applicable ordinance did not protect people such as the victim who approached a dog that was restrained in the bed of a truck, the victim's motion for a directed verdict on this claim was properly denied. *Huff v. Dyer*, 297 Ga. App. 761, 678 S.E.2d 206 (2009).

Trial court did not err in denying a motion for a directed verdict filed by the Board of Regents of the University System of Georgia on the issue of whether an assistant professor's employment contract incorporated the Rules and Procedures for Responding to Allegations of Research Misconduct because the Rules were issued by the medical college where the professor worked and were thus "regulations of this institution" within the meaning of the professor's contract, and the contract incorporated the Rules by reference thereto. *Bd. of Regents of the Univ. Sys. of Ga. v. Ambati*, 299 Ga. App. 804, 685 S.E.2d 719 (2009), cert. denied, No. S10C0086, 2010 Ga. LEXIS 34 (Ga. 2010).

Trial court properly denied the Department of Correction's motion for directed verdict as to the issue of duty in a premises liability action by an inmate because there was conflicting evidence as to whether the inmate was in the warden's home on a work detail as a benefit to the department and whether the inmate was warned to stay out of the kitchen and dining area where an accident occurred. *Ga. Dep't of Corr. v. Couch*, 312 Ga. App. 544, 718 S.E.2d 875 (2011).

Directed verdict improperly denied.

As the parties did not reach a meeting of the minds as to what type of trust was contemplated for purposes of a former business partner's deposit of insurance proceeds into a trust for the benefit of the deceased partner's minor daughter, there was no enforceable contract under O.C.G.A. § 13-3-1 and the trial court's denial of a directed verdict to the former business partner was error pursuant to O.C.G.A. § 9-11-50. *Oldham v. Self*, 279 Ga. App. 703, 632 S.E.2d 446 (2006).

In an action to recover on a promissory note filed by a bank, while the bank might have been negligent in managing and monitoring the loan to the bank's debtor,

absent any contrary evidence, the debtor remained obligated under the parties' contractual relationship. Hence, the trial court erred in failing to direct a verdict to the bank on the debtor's claim for negligence, attorney's fees, and punitive damages. *Fielbon Dev. Co. v. Colony Bank*, 290 Ga. App. 847, 660 S.E.2d 801 (2008).

It was error to deny an adjacent lot owner's motions for a directed verdict and judgment notwithstanding the verdict under O.C.G.A. § 9-11-50 in an action by property owners, alleging property damage and requesting an award of attorney fees under O.C.G.A. § 13-6-11, as there was a bona fide controversy regarding the adjacent lot owner's liability in the circumstances; further, there was no showing that the adjacent lot owner acted with bad faith. *Lowery v. Roper*, 293 Ga. App. 243, 666 S.E.2d 710 (2008).

Because an owner did not take a neighbor's threat seriously, and because the neighbor's later trespasses were not committed in the owner's presence, the trial court erred when it denied the neighbor's O.C.G.A. § 9-11-50(a) motion for directed verdict on the owner's emotional distress claim. *Norton v. Holcomb*, 299 Ga. App. 207, 682 S.E.2d 336 (2009), cert. denied, No. S09C1929, 2009 Ga. LEXIS 804 (Ga. 2009).

3. Time for Motion

Motion for directed verdict before evidence closed. — There was no error in the trial court's grant of a truck repairer's motion for directed verdict before the evidence was closed pursuant to O.C.G.A. § 9-11-50(a), as the owner failed to proffer additional evidence on the issue, such that the owner could not show that the owner was harmed by the trial court's ruling. *Puckette v. John Bailey Pontiac-Buick-GMC Truck, Inc.*, 311 Ga. App. 138, 714 S.E.2d 750 (2011).

Judgment Notwithstanding Verdict

When judgment n.o.v. proper.

Will proponent's motion for judgment notwithstanding the verdict on the issue of undue influence was properly granted to the proponent because the evidence failed to show undue influence, in that the attorney who prepared the will testified

that the will proponent was not present at the execution of the will, that the attorney discussed the contents of the will only with the testatrix, and that the testatrix had no doubt about what provisions the testatrix wanted in the will; the record also established that the proponent, who lived with the testatrix during the testatrix's last days, did not isolate the testatrix but that, instead, hospice personnel, friends, and family frequented the testatrix's house between the time when the proponent came to live with the testatrix and the time that the testatrix executed the will. *Smith v. Liney*, 280 Ga. 600, 631 S.E.2d 648 (2006).

In an action involving the sale of land, because no adequate description of the property sought to be sold could be found within the four corners of the parties' final agreement, no exhibits were attached, and the words used in the contract did not provide a sufficient description of the land, the trial court erred in admitting parol evidence to provide a legally sufficient description of the property at issue; hence, the property owners' motion for a judgment notwithstanding the verdict in favor of the buyer was erroneously denied. *McClung v. Atlanta Real Estate Acquisitions, LLC*, 282 Ga. App. 759, 639 S.E.2d 331 (2006).

In a boundary line dispute filed pursuant to O.C.G.A. § 23-3-61, the trial court properly entered judgment on a jury verdict in favor of the plaintiffs, two landowners, and against their neighbor, and then denied the neighbor a new trial, or alternatively a judgment notwithstanding the verdict, as: (1) the boundary line indicated on a plat reflecting the locations of monuments on the parcel owned by two landowners complied with the monuments referenced in the original warranty deed; and (2) the neighbor agreed to a special verdict form allowing the jury to find that the plat submitted by the two landowners accurately and sufficiently showed the true boundary line. *Dover v. Higgins*, 287 Ga. App. 861, 652 S.E.2d 829 (2007), cert. denied, 2008 Ga. LEXIS 237 (Ga. 2008).

Truck seller and its body shop were entitled to a judgment notwithstanding the verdict under O.C.G.A. § 9-11-50(b) on the truck purchasers' counterclaim re-

garding damages to the truck's engine during its bailment for repairs to the truck's body because the purchasers failed to provide evidence as to the truck's post-bailment fair market value. *Newberry v. TriStar Auto Group, Inc.*, 297 Ga. App. 313, 677 S.E.2d 370 (2009).

In a legal malpractice action, even assuming that a letter from the physicians would create a conflict in the evidence or undermine the credibility of an expert, neither of these factors would provide a proper basis for reversing the denial of a JNOV. *Johnson v. Leibel*, 307 Ga. App. 32, 703 S.E.2d 702 (2010).

When judgment n.o.v. not proper.

General partners' (GPs') motion for a judgment notwithstanding the verdict was properly denied as: (1) a \$ 1.6 million award for the limited partners (LPs) for breach of a partnership agreement was supported by expert testimony that damages could be calculated by taking the value of the LPs' interest in a partnership and estimating the increase in that value if it were invested in a manner similar to the LPs' other investments; (2) even if a previous judge's comments as to the determination of damages was an order, it was not the law of the case; (3) the GPs did not object to the verdict form, which allowed the jury free reign to set damages; and (4) the GPs' claim that the award did not directly correspond with specific evidence was properly rejected. *Kellett v. Kumar*, 281 Ga. App. 120, 635 S.E.2d 310 (2006).

Based on evidence that a manufacturer interfered with a distributor's business relationship with its customers by marketing to those customers a product the manufacturer had no legal right to sell, said claim was erroneously set aside. *Fertility Tech. Res., Inc. v. Lifetek Med., Inc.*, 282 Ga. App. 148, 637 S.E.2d 844 (2006).

Because sufficient evidence was presented to support a distributor's tortious interference with a contractual or business relationship claim alleged against a manufacturer, and because such was an intentional tort, demonstrating evidence of the manufacturer's bad faith, when coupled with other evidence of bad faith, at attorney-fee award under O.C.G.A. § 13-6-11 was authorized; thus, the trial court erred in setting the same aside in

granting the manufacturer's motion for a judgment notwithstanding the verdict. *Fertility Tech. Res., Inc. v. Lifetek Med., Inc.*, 282 Ga. App. 148, 637 S.E.2d 844 (2006).

In a negligence action seeking damages for a disabling injury filed against a property owner by a friend who assisted the owner in building a fence, because the evidence supported a verdict against the friend, and the trial court's various evidentiary rulings regarding: (1) the admission of evidence under both the medical records and business records exceptions to the hearsay rule; (2) the admission of evidence regarding the parties' friendship; (3) the impeachment of the friend's credibility; (4) the opening statement presented by the owner's counsel; and (5) the use of a leading question regarding the friend's use of Oxycontin, did not support a different result, the friend was not entitled to a new trial or judgment notwithstanding the verdict. *Imm v. Chaney*, 287 Ga. App. 606, 651 S.E.2d 855 (2007).

Trial court did not err in denying a motion for judgment notwithstanding the verdict after a jury awarded damages on an insurer's subrogation claim as there could be no apportionment of damages with a city, even if the city was deemed liable, because the city was not a party to the action pursuant to O.C.G.A. § 51-12-33. *Universal Underwriters Group v. Southern Guar. Ins. Co.*, 297 Ga. App. 587, 677 S.E.2d 760 (2009).

Because there was some evidence supporting the jury's verdict in favor of homeowners in their class action against a private water system owner, the trial court did not err in denying the owner's motion for new trial and the owner's motion for a judgment notwithstanding the verdict on general grounds, and since the case involved disputed factual issues, the trial court properly allowed the jury to resolve those issues; although the owner argued that the jury did not interpret the facts as the owner believes it should have, that argument presented no grounds that would allow the court of appeals to find error by the trial court in refusing to overturn the jury's verdict. *Jones v. Forest Lake Vill. Homeowners Ass'n*, 304 Ga. App. 495, 696 S.E.2d 453 (2010).

Grounds for motion same as grounds for directed verdict.

In a negligence action by an automobile driver, a trial court erred in granting a judgment notwithstanding the verdict (JNOV) under O.C.G.A. § 9-11-50(b) to the driver and amending the verdict to include a truck driver in the punitive damages portion thereof as the driver's motion for directed verdict made after appellants, the truck driver, the driver's employer, and the employer's insurer, rested only addressed the issue of the truck driver's and the employer's liability for compensatory damages. *Am. Material Servs. v. Giddens*, 296 Ga. App. 643, 675 S.E.2d 540 (2009).

Motion improperly denied.

A trial court erred when the court denied the motion for judgment notwithstanding the verdict filed by two relatives in an action by a third relative to quiet title in property that had been owned by a decedent; the deed filed by the third relative did not contain a complete description of the property to which the deed pertained, and therefore, the deed was invalid and could not supply the third relative with good title. *Lord v. Holland*, 282 Ga. 890, 655 S.E.2d 602 (2008).

New Trials

Motion improperly denied. — In an action involving the sale of land, because no adequate description of the property sought to be sold could be found within the four corners of the parties' final agreement, no exhibits were attached, and the words used in the contract did not provide a sufficient description of the land, the trial court erred in admitting parol evidence to provide a legally sufficient description of the property at issue; hence,

the property owners' motion for a new trial was erroneously denied. *McClung v. Atlanta Real Estate Acquisitions, LLC*, 282 Ga. App. 759, 639 S.E.2d 331 (2006).

After general verdict.

Where a directed verdict under O.C.G.A. § 9-11-50(a) on medical expenses was erroneously granted in a suit based on a vehicular collision, a new trial was required because after the directed verdict, the jury awarded general damages, and the appellate court was unable to conclude that the error was harmless since it could not determine if the jury factored the medical bills into account in awarding the general damages. *Allen v. Spiker*, 301 Ga. App. 893, 689 S.E.2d 326 (2009), cert. denied, No. S10C0740, 2010 Ga. LEXIS 454 (Ga. 2010).

Failure to hold new trial on remand. — On remand, because the only relief sought by a distributor in a contract action with a buyer was a new trial, and not the denial of a directed verdict or JNOV, the trial court erred in entering judgment in favor of the distributor without conducting a new trial; moreover, the buyer was not foreclosed from presenting additional or different evidence in support of its claim for lost profits in said trial. *Strickland & Smith, Inc. v. Williamson*, 281 Ga. App. 784, 637 S.E.2d 170 (2006).

As a former husband failed to seek a directed verdict in the trial court, the husband could not argue on appeal that the court should enter judgment in the husband's favor as a matter of law based on the insufficiency of the evidence in a matter, wherein the husband was sued for alleged nonpayment under a promissory note; however, the husband was not barred on appeal from arguing that a new trial was warranted. *Cawley v. Bennett*, 293 Ga. App. 46, 666 S.E.2d 438 (2008).

9-11-52. Findings by the court.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

FINDINGS, GENERALLY

WHEN FINDINGS NECESSARY

REVIEW OF FINDINGS ON APPEAL

General Consideration

Applicability. — An award of attorney fees under O.C.G.A. § 9-15-14 had to be vacated and remanded for reconsideration when the trial court had not made findings of fact and conclusions of law supporting the award, as such findings and conclusions were mandatory and did not have to be requested under O.C.G.A. § 9-11-52(a); furthermore, the lack of findings of fact and conclusions of law in the trial court's order overcame the presumption of regularity of all proceedings in a court of competent jurisdiction. *Gilchrist v. Gilchrist*, 287 Ga. App. 133, 650 S.E.2d 795 (2007).

Request filed on same day as notice of appeal. — Court could not consider commercial tenant's argument that tenant's motion for findings of fact and conclusions of law was refused; even assuming that tenant filed a motion that complied with O.C.G.A. § 9-11-52, motion was untimely because it was filed on the same day as the notice of appeal, filing of which deprived trial court of the power to affect judgment appealed. *Keita v. K & S Trading*, 292 Ga. App. 116, 663 S.E.2d 362 (2008).

Waiver by failure to make postjudgment motion. — Appellant who intends to argue that a trial court's findings are inadequate or incomplete waives that argument by failing to make the postjudgment motion referenced in O.C.G.A. § 9-11-52(c). In such cases, an appellate court does not remand for additional findings but simply affirms. *Brannon v. Perryman Cemetery, Ltd.*, 308 Ga. App. 832, 709 S.E.2d 33 (2011).

Request made after court's ruling. — Trial court, following the grant of an injunction requiring the manager of an adult day care center to hand over control of the center to the owner, was not required to make findings of fact and conclusions of law because the manager's request was not made until after the injunction had issued. *Kim v. First One Group, LLC*, 305 Ga. App. 861, 700 S.E.2d 729 (2010).

Trial court did not abuse the court's discretion by issuing an order that did not include findings of fact and conclusions of law and in failing to amend the court's

order to include such findings and conclusions after a debtor filed a request pursuant to O.C.G.A. § 9-11-52 because the issues presented in the trial court were clearly reflected in the record, the only witness to testify at trial was the debtor, and the resolution of the issues depended on the law as applied to the undisputed facts; O.C.G.A. § 9-11-52(c) applied because the debtor did not file a motion asking the trial court to enter findings of fact and conclusions of law until after the trial court entered the court's judgment on the debtor's counterclaim. *Sevostiyanova v. Tempest Recovery Servs.*, 307 Ga. App. 868, 705 S.E.2d 878 (2011).

Request made after entry of judgment. — In divorce proceedings, because a former spouse moved for findings of fact after entry of the judgment, the trial court had the discretion to grant the motion for findings of fact but was not required to do so under O.C.G.A. § 9-11-52(c). *Hunter v. Hunter*, 289 Ga. 9, 709 S.E.2d 263 (2011).

No error in declining to amend judgment. — Trial court did not err in declining to amend a judgment prohibiting a limited liability company (LLC) from making any permanent changes to the surface of property owners' land in replacing a sewer pipe by including the additional finding that the owners could not make any permanent changes to the surface of the easement until installation of the new sewer pipe because the issue of the owners' planned construction and any potential claims related thereto were not included in the pre-trial order as matters for determination, and the LLC had not previously requested any declaratory or injunctive relief pertaining to that issue prior to the entry of judgment. *Parris Props., LLC v. Nichols*, 305 Ga. App. 734, 700 S.E.2d 848 (2010).

Cited in *McCart v. State*, 289 Ga. App. 830, 658 S.E.2d 465 (2008); *Hathaway Dev. Co. v. Advantage Fire Sprinkler Co.*, 290 Ga. App. 374, 659 S.E.2d 778 (2008); *Gooch v. Tudor*, 296 Ga. App. 414, 674 S.E.2d 331 (2009); *Asgharneya v. Hadavi*, 298 Ga. App. 693, 680 S.E.2d 866 (2009); *Washington v. Harrison*, 299 Ga. App. 335, 682 S.E.2d 679 (2009); *Johnson v. Randolph County*, 301 Ga. App. 265, 687 S.E.2d 223 (2009); *Katz v. Crowell*, 302

Ga. App. 763, 691 S.E.2d 657 (2010); *SN Int'l, Inc. v. Smart Props.*, 311 Ga. App. 434, 715 S.E.2d 826 (2011); *In re Estate of Tapley*, 312 Ga. App. 234, 718 S.E.2d 92 (2011); *Shotwell v. Filip*, 314 Ga. App. 93, 722 S.E.2d 906 (2012).

Findings, Generally

Order based on finding of fact.

Following a bench trial, the trial court properly awarded a lessee a monetary judgment, and the lessor possession of the premises as the clear language of the underlying contract between them provided that the parties intended the contract to be a purchase and sale agreement, and the lessor's failure to perform barred the court from enforcing a liquidated damages provision. Thus, the appeals court refused to disturb the trial court's factual findings, as such were not clearly erroneous. *Lifestyle Home Rentals, LLC v. Rahman*, 290 Ga. App. 585, 660 S.E.2d 409 (2008).

Waiver of argument that findings were insufficient. — When a purchaser of land did not make a postjudgment motion under O.C.G.A. § 9-11-52(c) for amended or additional findings, the purchaser waived the argument that a special master's findings of fact did not set forth sufficient findings to justify the conclusions of law. *Waters v. Ellzey*, 290 Ga. App. 693, 660 S.E.2d 392 (2008).

Remand to trial court for preparation of findings and conclusions.

Judgment granting the state's petition to validate revenue bonds under the Revenue Bond Law, O.C.G.A. § 36-82-60 et seq., was remanded to the trial court because the trial court failed to mention in the judgment the citizen who intervened in the proceedings and to set forth findings of fact and conclusions of law with respect to various grounds pursued by the citizen as required by O.C.G.A. § 9-11-52(a); prior to the judgment, the citizen requested findings of fact and conclusions of law. *Sherman v. Dev. Auth.*, 314 Ga. App. 237, 723 S.E.2d 528 (2012).

Findings proper. — In a stockholder's suit against a corporation and its other owners, the trial court's finding that the stockholder paid in full for the stock issued to him was not clearly erroneous,

based on the uncontradicted testimony from the vice-president of the corporation's bookkeeper, corporate record corroborated by financial and tax findings by the corporation, and no inference based on circumstantial evidence was rebutted by direct testimony. *Monterrey Mexican Rest. of Wise, Inc. v. Leon*, 282 Ga. App. 439, 638 S.E.2d 879 (2006).

When Findings Necessary

Dismissal rendered hearing moot.

— Since the plaintiff did not perfect service, the trial court correctly dismissed that suit; dismissal of the action rendered a hearing on the merits and compliance with O.C.G.A. § 9-11-52 moot. *Nally v. Bartow County Grand Jurors*, 280 Ga. 790, 633 S.E.2d 337 (2006).

Findings entered only upon request.

Because conflicting evidence was presented concerning the values of the parties' assets as well as the premarital and marital contributions of each spouse, the trial court, sitting as the trier of fact, was required to determine whether and to what extent a particular asset was marital or non-marital, exercise its discretion, and then divide the marital property equitably; hence, inasmuch as the issues on appeal depended upon the factual determinations made by the trial court as fact finder, and neither party asked the trial court to make factual findings, the equitable distribution of marital property was not improper as a matter of law or fact. *Mathis v. Mathis*, 281 Ga. 865, 642 S.E.2d 832 (2007).

Trial court did not err by failing to set forth findings of fact and conclusions of law after a bench trial hearing in the trial court's denial of an estate administrator's petition for leave to recover and sell the estate's property as the administrator never requested such findings and conclusions of law within the time period required by O.C.G.A. § 9-11-52. *Huggins v. Powell*, 293 Ga. App. 436, 667 S.E.2d 219 (2008).

In a dispossessory proceeding, as the mortgagors did not request the state court to enter findings of fact and conclusions of law until after a ruling had been entered, the state court was not required to include

that information pursuant to O.C.G.A. § 9-11-52(a) as to each of the mortgagors' defenses and counterclaims; O.C.G.A. § 44-7-56, which provided a mechanism for trial courts to enter findings of fact and conclusions of law in dispossessory cases being appealed, was permissive, not mandatory. *Mackey v. Fed. Nat'l Mortg.*, 294 Ga. App. 495, 669 S.E.2d 397 (2008).

Because the parties agreed that a verdict would be rendered without findings of fact and conclusions of law pursuant to O.C.G.A. § 9-11-52(a), (c), the trial court did not err in failing to make findings of fact and conclusions of law. *Swainsboro Cabinet Co. v. Ed Johns Constr. Co.*, 299 Ga. App. 462, 682 S.E.2d 599 (2009).

An appellant who did not request findings of fact and conclusions of law under O.C.G.A. § 9-11-52(a) failed to demonstrate error in the trial court's failure to specify the court's reasons for issuing an interlocutory injunction. *Am. Lien Fund, LLC v. Dixon*, 286 Ga. 562, 690 S.E.2d 415 (2010).

Because a chairperson of the board of education failed to allege any error in the sufficiency of the trial court's findings of fact or conclusions of law or request that the trial court amend the court's judgment to separately make such findings or conclusions, the chairperson has waived the right to challenge the sufficiency of the findings of fact and conclusions of law pursuant to O.C.G.A. § 9-11-52. *Cook v. Smith*, 288 Ga. 409, 705 S.E.2d 847 (2010).

Review of Findings on Appeal

Finding of trial court upheld.

In a case in which the trial court found that the appellant altered its lot, for the purpose of operating a used car business, creating an artificial increase in the water flowing onto the appellee's property, the trial court did not clearly err under O.C.G.A. § 9-11-52(a) in determining that an adequate cure for the runoff problem required both implementation of a second engineering plan and removal of motor vehicles from the rear portion of the lot, as the record supported the finding that the placement of gravel on the lot, together with the metal roof created by the number of vehicles parked there, rendered a sub-

stantial portion of the lot virtually impermeable. *Menzies v. Hall*, 281 Ga. 223, 637 S.E.2d 415 (2006).

The trial court's factual finding that a car dealer had not breached a verbal agreement to its customer regarding the wiring to an uninstalled radio unit that the customer sought was not clearly erroneous, given the appellate court's deference, as the radio was not an essential accessory that should have come with the radio as part of its purchase. *Rise v. GAPVT Motors, Inc.*, 288 Ga. App. 246, 653 S.E.2d 320 (2007).

A trial court's findings in favor of a customer on the customer's counterclaim for malicious prosecution in a contractor's breach of contract and trover claim were upheld as the evidence established that the contractor had signed a sworn affidavit stating that the customer committed criminal fraud by not paying for an installed fence on the customer's property and refused to pay when the amount due was merely in dispute and the customer had, in fact, tendered a check for a portion of the amount due indicating that the remaining balance was in dispute. The fact that the contractor's execution of those false statements had consequences not intended, namely that the customer spent two nights in jail, was insufficient to absolve the contractor's liability for making them. *Gooch v. Tudor*, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

Failure to request.

On appeal from an order equitably distributing the parties' marital property, inasmuch as the issues on appeal depended upon the factual determinations made by the trial court as fact-finder, and neither party asked the trial court to make factual findings, the Supreme Court of Georgia was unable to conclude that the trial court's equitable distribution of marital property was improper as a matter of law or as a matter of fact. *Crowder v. Crowder*, 281 Ga. 656, 642 S.E.2d 97 (2007).

In an action to collect on past-due amounts owed by a homebuilder to two contractors, because the homebuilder failed to move the trial court to make or amend its findings, or make additional findings and amend the judgment to the extent necessary for review, the

homebuilder waived any claim on appeal that the trial court’s findings were inadequate or incomplete. *Hampshire Homes, Inc. v. Espinosa Constr. Servs.*, 288 Ga. App. 718, 655 S.E.2d 316 (2007).

City waived the right to challenge the sufficiency of the findings of fact and conclusions of law contained in the trial court’s judgment pursuant to O.C.G.A. § 9-11-52 because the city filed motions to set aside the judgment and to open default within 20 days after the judgment was entered, but such post-judgment motions did not allege any error in the sufficiency of the trial court’s findings of fact or conclusions of law or request that the trial court amend its judgment to separately make such findings or conclusions. *City of*

East Point v. Jordan, 300 Ga. App. 891, 686 S.E.2d 471 (2009), cert. denied, No. S10C0494, 2010 Ga. LEXIS 337 (Ga. 2010).

Motion properly denied. — In a commercial landlord’s suit for damages to the extent that the rent it would have been paid exceeded fair market value, the trial court properly denied the landlord’s motions to amend the judgment or for a new trial; the landlord, via O.C.G.A. § 9-11-52(c), had improperly attempted to inject into the case a new methodology for calculating damages to replace the one it had used at trial. *Truststreet Props. v. Burdick*, 287 Ga. App. 565, 652 S.E.2d 197 (2007).

ARTICLE 7

JUDGMENT

9-11-54. Judgments.

Law reviews. — For survey article on zoning and land use law, see 59 *Mercer L. Rev.* 493 (2007).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- MULTIPLE CLAIMS OR PARTIES
- RELIEF GRANTED
- COSTS

General Consideration

Use of term “final” not dispositive. — Under the express language of O.C.G.A. § 9-11-54(b), the mere designation of a judgment as “final” is not controlling. Whether an order is final and appealable is judged by the order’s function and substance, rather than any “magic language.” *Rhymes v. E. Atlanta Church of God, Inc.*, 284 Ga. 145, 663 S.E.2d 670 (2008).

A trial court may not award relief beyond that sought in the complaint, etc.

Because the superior court modified the court’s judgment so as to vacate the court’s order of dismissal and provide only for the

entry of a default judgment, the issue of dismissal was moot and provided no basis for setting aside the judgment. But, because the court, absent amendment to the demand for judgment or argument supporting the judgment, awarded damages in excess of the amount claimed, that award had to be reversed. *Stamps v. Nelson*, 290 Ga. App. 277, 659 S.E.2d 697 (2008).

Grant of summary judgment during plaintiff’s case-in-chief appropriate.

— In a suit asserting undue influence and seeking revocation of a testator’s will, the trial court did not err in granting summary judgment to the defendant on the issue of revocation during the presentation of the plaintiff’s case-in-chief be-

cause, pursuant to O.C.G.A. § 9-11-54, there is no procedural impediment to a trial court granting a party's motion for summary judgment without disposing of the entire case. *Morrison v. Morrison*, 282 Ga. 866, 655 S.E.2d 571 (2008).

Custodial parent was not prevailing party. — O.C.G.A. § 9-11-54(d) was not applicable to a case because the custodial parent was not the prevailing party as all three counts of the other parent's petition alleging contumacious conduct of the custodial parent were upheld by the trial court. *Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011).

No error in declining to amend judgment. — Trial court did not err in declining to amend a judgment prohibiting a limited liability company (LLC) from making any permanent changes to the surface of property owners' land in replacing a sewer pipe by including the additional finding that the owners could not make any permanent changes to the surface of the easement until installation of the new sewer pipe because the issue of the owners' planned construction and any potential claims related thereto were not included in the pre-trial order as matters for determination, and the LLC had not previously requested any declaratory or injunctive relief pertaining to that issue prior to the entry of judgment. *Parris Props., LLC v. Nichols*, 305 Ga. App. 734, 700 S.E.2d 848 (2010).

Cited in *Stubbs v. Pickle*, 287 Ga. App. 246, 651 S.E.2d 171 (2007); *Ferdinand v. City of East Point*, 288 Ga. App. 152, 653 S.E.2d 529 (2007), cert. denied, 2008 Ga. LEXIS 213 (Ga. 2008); *Planning Techs., Inc. v. Korman*, 290 Ga. App. 715, 660 S.E.2d 39 (2008); *Southern Mut. Church Ins. Co. v. ARS Mech., LLC*, 306 Ga. App. 748, 703 S.E.2d 363 (2010); *Cmty. State Bank v. Strong*, 651 F.3d 1241 (11th Cir. 2011).

Multiple Claims or Parties

Two methods of appeal.

As a church's suit against a minister involved multiple claims, and the trial court's decision adjudicated fewer than all of them, in order to appeal, the minister had to either: (1) obtain entry of judgment under O.C.G.A. § 9-11-54(b) based on a

finding of no just reason for delay; or (2) obtain a certificate allowing immediate appeal under O.C.G.A. § 5-6-34(b). Because neither § 9-11-54(b) nor § 5-6-34(b) was followed, the minister's appeal was premature. *Rhymes v. E. Atlanta Church of God, Inc.*, 284 Ga. 145, 663 S.E.2d 670 (2008).

Judgment as to fewer than all claims or parties not final unless express determination made.

In insureds' suit regarding mold remediation work on the insureds' home, the insureds' were not required to appeal a ruling enforcing a settlement agreement with their insured and an order denying reconsideration of this ruling within 30 days because the orders were not final since the insureds' case remained pending against a construction company, and the trial court did not expressly determine that there was no just cause for delay and designate the orders as final judgments pursuant to O.C.G.A. 9-11-54(b). *Stephens v. Alan V. Mock Construction Co., Inc.*, 302 Ga. App. 280, 690 S.E.2d 225, cert. denied, No. S10C1012, 2010 Ga. LEXIS 533 (Ga. 2010).

Procedural default. — Court of appeals erred in reversing the trial court's grant of partial summary judgment in favor of a county because the trial court did not have authority to enter the court's order purporting to make the grant of partial summary judgment final under O.C.G.A. § 9-11-54(b) since by the arrestee's first notice of appeal, an arrestee put the machinery of appellate review into motion under O.C.G.A. § 9-11-54(h) and committed a procedural default; accordingly, the arrestee was foreclosed from resubmitting the matter for review on appeal of the final judgment, and because the first direct appeal was dismissed, that dismissal was binding upon the trial court under O.C.G.A. § 9-11-60(h). *Houston County v. Harrell*, 287 Ga. 162, 695 S.E.2d 29 (2010).

Voluntary dismissal of joint tortfeasor did not void judgment against remaining defendants. — A voluntary dismissal with prejudice of an alleged joint tortfeasor did not void the judgment entered against the remaining defendants, but only adjudicated the lia-

bilities of that party; as it neither terminated the action nor rendered the default judgment void, the trial court did not err in refusing to set aside a default judgment. *Mateen v. Dicus*, 286 Ga. App. 760, 650 S.E.2d 272 (2007), 129 S. Ct. 89, 172 L.Ed.2d 30 (2008).

Rulings declaring a mistrial and making pretrial rulings for a new trial involving a judgment debtor did not fall within the provisions of O.C.G.A. § 5-6-34(d) and were not appealable; the case against the debtor remained pending below, although other claims involving the debtor's transferees had been resolved by a jury and were final. *Chapman v. Clark*, 313 Ga. App. 820, 723 S.E.2d 51 (2012).

Summary judgment on one claim.

Seller was entitled to immediate judgment on a promissory note pursuant to O.C.G.A. § 9-11-54(b) because the buyers failed to make payments on the note, and the buyers did not show damages in any amount from the alleged failure of consideration; the note was supported by adequate consideration because the buyers took immediate possession of the seller's business and began operating the business as the buyers' own. *West v. Diduro*, 312 Ga. App. 591, 718 S.E.2d 815 (2011), cert. denied, 2012 Ga. LEXIS 279 (Ga. 2012).

Relief Granted

Judgment void where defendant never afforded opportunity to be

heard. — A trial court's order which granted full relief to a company seeking certain e-mail records from the Georgia Department of Agriculture was void; the notice for the case management hearing from which the order emanated did not satisfy the notice requirements in O.C.G.A. § 9-10-2(1) for a hearing on the full merits of the case as the notice stated only "small motions" and procedural matters would be considered, and the department was never afforded an opportunity to present its opposition to the request through an O.C.G.A. § 9-11-54(c)(1) hearing. *Ga. Dep't of Agric. v. Griffin Indus.*, 284 Ga. App. 259, 644 S.E.2d 286 (2007).

Costs

Order denying costs vacated. — Order declining to award a limited liability company (LLC) costs was vacated, and the matter was remanded for reconsideration because the jury found in favor of property owners on the owners' claim for nuisance but not on the owners' additional claims for trespass and punitive damages; the jury found in favor of the LLC on the issue of whether replacement with a six-inch or eight-inch pipe would constitute a substantial change and on the LLC's counterclaim for conversion but not on the LLC's additional counterclaims for trespass and punitive damages. *Parris Props., LLC v. Nichols*, 305 Ga. App. 734, 700 S.E.2d 848 (2010).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 7C Am. Jur. Pleading and Practice Forms, Costs, § 3.

9-11-55. Default judgment.

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary

administration, see 60 Mercer L. Rev. 417 (2008).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
WHEN CASE IN DEFAULT
PROOF OF DAMAGES

1. IN GENERAL

2. JURY TRIAL OF DAMAGE ISSUE

OPENING DEFAULT

1. IN GENERAL

2. AS MATTER OF RIGHT

3. AT ANY TIME BEFORE JUDGMENT

General Consideration**O.C.G.A. § 9-11-56 not controlling as to default.**

As there was no such thing as a default summary judgment, summary judgment was not authorized merely because a defendant filed a one-page response that contained no substantive argument and failed to comply with Ga. Unif. Super. Ct. R. 6.5. *Milk v. Total Pay & HR Solutions, Inc.*, 280 Ga. App. 449, 634 S.E.2d 208 (2006).

Default does not admit legal conclusions in complaint. — While a default operates as an admission of the well-pled factual allegations in a complaint, it does not admit the legal conclusions contained therein; as such, a default does not preclude a defendant from showing that under the facts as deemed admitted, no claim existed which would allow the plaintiff to recover. *Fink v. Dodd*, 286 Ga. App. 363, 649 S.E.2d 359 (2007).

Collateral attack on valid default judgment unauthorized. — The trial court properly dismissed a business' contribution action, filed pursuant to O.C.G.A. § 51-12-32, on subject matter jurisdiction grounds, as: (1) its finding that the business was the sole tortfeasor barred the action; (2) that finding was not void; (3) no appeal was taken from that finding; and (4) the suit amounted to an improper collateral attack on the default judgment entered against the business. *State Auto Mut. Ins. Co. v. Relocation & Corporate Hous. Servs.*, 287 Ga. App. 575, 651 S.E.2d 829 (2007), cert. denied, 2008 Ga. LEXIS 163 (Ga. 2008).

Movant not entitled to default judgment.

In an action between a contractor and a landowner alleging a breach of contract and other related claims in which disputes arising under the parties' contract were required to be submitted to arbitration, the superior court erred in entering a

default judgment against the landowner, and in denying relief from the same, ignoring a stay pending arbitration, as the issues involved in the litigation were ones that fell under the parties' agreement. *GF/Legacy Dallas, Inc. v. Juneau Constr. Co., LLC*, 282 Ga. App. 14, 637 S.E.2d 511 (2006), cert. denied, 2007 Ga. LEXIS 157 (Ga. 2007).

In a suit arising from a contract for the sale of land, because the buyer waived the right to a default judgment by raising the issue of default for the first time on appeal, the trial court did not err in considering the seller's evidence and entering judgment in the seller's favor. *Shirley v. Ficarrota*, 285 Ga. App. 169, 645 S.E.2d 667 (2007).

Trial court did not err in denying a candidate's request for entry of a default judgment on a 42 U.S.C. § 1983 claim that a county board of elections (BOE) and board members violated the candidate's rights under the United States Constitution and on the claim that they conspired to commit fraud against the candidate by attempting to have the candidate's name removed from the ballot in an election for county commissioner because the answer of the BOE and members to those claims was valid and timely when the BOE and members filed an answer within 30 days after service of the summons and petition; the judgment from which the BOE and members appealed addressed only the candidate's request for injunctive relief and did not address the merits of the candidate's claims for damages based on their alleged violations of the candidate's constitutional rights or their alleged acts of fraud against the candidate, and because those claims were distinct from the injunction appealed, they remained within the trial court's jurisdiction. *Johnson v. Randolph County*, 301 Ga. App. 265, 687 S.E.2d 223 (2009).

Default judgment proper. — Default judgment was properly entered against an

LLC, as the trial court did not err in holding that it was required to be represented by counsel; further, without a hearing transcript, the appeals court was unable to review its claims that the trial court erred in denying it the opportunity to hire counsel, file an amended answer and hold a hearing on the amount of damages owed. *Sterling, Winchester & Long, LLC v. Loyd*, 280 Ga. App. 416, 634 S.E.2d 188 (2006).

Because a medical care provider failed to assert an available defense in the underlying action which would have absolved it from any liability and prevented a default judgment from entering against it, the trial court did not err in entering summary judgment against it on its claims for contribution and indemnity. *Emergency Professionals of Atlanta, P.C. v. Watson*, 288 Ga. App. 473, 654 S.E.2d 434 (2007), cert. denied, 2008 Ga. LEXIS 407 (Ga. 2008).

Error in default judgment when no proof established negligence. — In a negligence action involving a nursing home, the trial court erred by entering a default judgment against two shareholder entities of the corporate nursing home as the complaint failed to allege any abuses of the corporate form on their part and did not allege that the shareholder entities actually mistreated the deceased resident. *EnduraCare Therapy Mgmt. v. Drake*, 298 Ga. App. 809, 681 S.E.2d 168 (2009).

Default only operates as an admission of the well-pleaded allegations of a complaint and does not preclude a defaulting party from showing that no claim existed that would permit recovery; therefore, although a management company for the landlord of a storage facility was in default, it properly presented evidence showing that the tenant was limited to recovery for breach of contract, and that the tenant did not assert a valid tort claim based solely on the breach of contract. *Lancaster v. Storage USA P'ship, L.P.*, 300 Ga. App. 567, 685 S.E.2d 474 (2009).

Appeal from denial of motion to set aside default judgment.

When the owners of a corporation sued waived a forum selection clause, they also waived the defenses of personal jurisdic-

tion and venue by failing to raise them at the earliest opportunity; thus, as non-parties to the underlying case, the owners could not otherwise appeal the default judgment against the corporation. *Rice v. Champion Bldgs., Inc.*, 288 Ga. App. 597, 654 S.E.2d 390 (2007), cert. denied, 2008 Ga. LEXIS 326 (Ga. 2008).

Trial court's oral pronouncement of default on multiple parties not binding. — Trial court's oral announcement that the court was imposing a default judgment against a husband and his parents for abandonment of the husband's child was not binding on the trial court, and the court properly later determined that the court could not impose damages against the parents for the husband's abandonment. *Bridges v. Wooten*, 305 Ga. App. 682, 700 S.E.2d 678 (2010).

Cited in *Majeed v. Randall*, 279 Ga. App. 679, 632 S.E.2d 413 (2006).

When Case in Default

Automatic default after expiration of statutory period.

Trial court did not err in granting a financial corporation's motion for default judgment in an action to establish a lost security deed because the buyer failed to respond within the time period allowed by O.C.G.A. § 9-11-55. *Haamid v. First Franklin Fin. Corp.*, 299 Ga. App. 828, 683 S.E.2d 891 (2009).

Failure to perfect service. — Time for filing an answer never began to run because the plaintiff did not perfect service on any of the defendants in the case, and thus there was never a default. *Nally v. Bartow County Grand Jurors*, 280 Ga. 790, 633 S.E.2d 337 (2006).

Answer to amendment adding party not required.

The trial court erred in entering a default judgment against a law firm sued by a client in a legal malpractice action, as the law firm was not required to answer an amended complaint, which added it as a party, absent a court order directing it to file a responsive pleading. *Stubbs v. Pickle*, 287 Ga. App. 246, 651 S.E.2d 171 (2007).

Answer to be filed within 30 days after service.

Because a plaintiff's personal injury ac-

tion against a driver lapsed into default due to the driver's failure to timely file an answer or other responsive pleading, despite the fact that the driver could have moved to open the default, when no attempt was made to do so, the trial court erred in failing to grant plaintiff a default judgment against the driver and in considering the driver's motion to dismiss. *Lewis v. Waller*, 282 Ga. App. 8, 637 S.E.2d 505 (2006).

Mere filing of a default summary judgment motion did not result in the entry of a default judgment. — Nothing showed a final or conclusive judgment on the merits in plaintiff home buyer's state court case against defendant companies, and the buyer's mere filing of a default summary judgment motion did not result in the entry of a default judgment; thus, the Rooker-Feldman doctrine did not preclude federal jurisdiction upon removal. *Jones v. Commonwealth Land Title Ins. Co.*, No. 11-13469, 2012 U.S. App. LEXIS 1487 (11th Cir. Jan. 25, 2012) (Unpublished).

Default operates to admit only the well-pleaded allegations, etc.

Trial court did not err in awarding damages to an attorney on default judgment without conducting a trial or requiring evidence of the reasonableness of the attorney fees because, in a lawsuit seeking the balance due on an account where the case was in default under O.C.G.A. § 9-11-55(a), a doctor was deemed to have admitted each and every allegation of the attorney's petition. *Vaughters v. Outlaw*, 293 Ga. App. 620, 668 S.E.2d 13 (2008).

Denial of motion for default judgment error when party failed to answer. — Denial of a listing broker's motion for default judgment against a buyer was error because the buyer did not file an answer, the time for filing an answer was not extended, and under O.C.G.A. § 9-11-55(a), the buyer's case was automatically in default 30 days after the buyer was served; further, the buyer did not move to open the default. The trial court's earlier findings on cross-motions for summary judgment regarding the co-defendant's lack of contractual liability were irrelevant to the issue of whether the listing broker was entitled to default judgment.

H.N. Real Estate Group, LLC v. Dixon, 298 Ga. App. 124, 679 S.E.2d 130 (2009).

Waiver of default. — Executor of the decedent's estate waived the right to seek a default judgment in a medical malpractice lawsuit because the executor allowed the health care provider to file an untimely answer and then waited over a year and a half before moving for, or otherwise raising, the issue of default, while in the meantime engaging in efforts to compel discovery responses and joining with the health care provider in filing motions to extend the completion of discovery. *Laurel Baye Healthcare of Macon, LLC v. Neubauer*, No. A11A2367; No. A11A2368, 2012 Ga. App. LEXIS 335 (Mar. 26, 2012).

Proof of Damages

1. In General

Strict proof of damages required.

Trial court erred in entering a default judgment in the amount of \$15,000 against a home inspector because a purchaser's damages were unliquidated, and other than the prayer in the purchaser's complaint for \$15,000, the purchaser made no showing of the amount of damages; the purchaser's failure to prove the purchaser's damages constituted a nonamendable defect within the meaning of the Georgia Civil Practice Act, O.C.G.A. § 9-11-60(d)(3). *Strickland v. Leake*, 311 Ga. App. 298, 715 S.E.2d 676 (2011).

2. Jury Trial of Damage Issue

Failure to make specific demand.

Upon a review of the evidence before the trial court, because neither of an individual's filed documents amounted to a "pleading" which placed damages in issue, neither document was in the nature of a formal answer, and neither actually disputed the amount of damages claimed, the trial court did not err in denying the individual a jury trial on the issue of damages; hence, the appeals court noted that to avoid doubt and confusion in the future, a defendant desiring a jury trial should file an answer specifically contesting damages and a demand for jury trial on the issue of damages, both clearly la-

beled as such. *Diaz v. Wills*, 286 Ga. App. 357, 649 S.E.2d 353 (2007).

Defendant erroneously precluded from offering evidence. — By deeming claims of wrongful termination and slander as admitted due to a defendant's default in the action, the trial court erred since only well-pled facts in the complaint were deemed admitted by the default, not legal conclusions contained in the complaint; as a result, the trial court erred by precluding the defendant from offering evidence to contradict those claims at a hearing on damages. *Fink v. Dodd*, 286 Ga. App. 363, 649 S.E.2d 359 (2007).

Opening Default

1. In General

Failure to meet statutory requirements.

Because a party seeking to open a default did not satisfy any of the three O.C.G.A. § 9-11-55(b) grounds for opening a default, a trial court had no discretion to open the default; a city did not show excusable neglect by arguing that it sent the complaint to its insurer, since the city did nothing to ensure that the insurer received the complaint or that an answer was filed; the trial court erred in setting the default aside. *Williams v. City of Atlanta*, 280 Ga. App. 785, 635 S.E.2d 165 (2006).

Because the plaintiff presented sufficient evidence that, after filing its complaint, it provided the sheriff's office with the defendant's correct address, and a few weeks later, contacted the sheriff's office to inquire whether service had been completed upon the defendant and learned that repeated service attempts were unsuccessful, evidence of reasonable diligence supporting the denial of a motion to set aside a default judgment was found; moreover, unlike O.C.G.A. § 9-11-4(e)(1), service via overnight delivery, was supported and did not violate the defendant's due process rights. *B&B Quick Lube, Inc. v. G&K Servs. Co.*, 283 Ga. App. 299, 641 S.E.2d 198 (2007).

In an action filed for payment of a debt, because a guarantor of that debt failed to provide either a meritorious defense or present sufficient facts to substantiate a

claim of excusable neglect, the trial court did not abuse its discretion in denying the guarantor's motion to open the default judgment entered. *Butterworth v. Safelite Glass Corp.*, 287 Ga. App. 848, 652 S.E.2d 877 (2007).

In a suit to collect on an open account, a trial court did not abuse the court's discretion by denying the debtor's motion to open a default judgment entered against the debtor because the motion was not made under oath and the only basis for the failure of the debtor to file an answer was for "unknown reasons," which was not a sufficient ground under O.C.G.A. § 9-11-55. *Ga. Kidney & Hypertension Specialists, Inc. v. Fresenius USA Mktg.*, 291 Ga. App. 429, 662 S.E.2d 245 (2008).

To open default requires factual information showing meritorious defense.

In an architecture company's suit against a former client for failure to pay consulting fees, the trial court properly refused to open a prejudgment default because the client failed to show the existence of a meritorious defense, as required by O.C.G.A. § 9-11-55(b); the client's sworn motion was completely devoid of facts and details that would have provided a defense to the action. *Water Visions Int'l, Inc. v. Tippet Clepper Assocs.*, 293 Ga. App. 285, 666 S.E.2d 628 (2008).

Court's discretion not disturbed absent manifest abuse.

Because defendant effectively waived defenses of a lack of both personal jurisdiction and venue in failing to appear at trial, trial court did not abuse the court's discretion in striking defendant's answer and denying a motion to set aside the default judgment entered. *Jacques v. Murray*, 290 Ga. App. 334, 659 S.E.2d 643 (2008).

In five consolidated aviation wrongful death cases and one aviation property case, the trial court properly denied the out-of-state seller's motion to open the default judgment entered against the seller as it was within the trial court's discretion to deny the motion on the ground of the seller's negligent and excusable failure to keep up with the seller's registered agent to obtain notice and the insurer's inexplicable failure to recognize

that the insurer had a duty to defend the lawsuit on behalf of the seller. *Vibratech, Inc. v. Frost*, 291 Ga. App. 133, 661 S.E.2d 185 (2008).

Setting aside of default judgment held abuse of discretion.

Because a lessee's conduct during the discovery stage of the proceedings below on the lessor's breach-of-lease complaint clearly demonstrated gross neglect, specifically, the lessee's failure to: (1) respond to a motion to compel and attend the hearing thereon; (2) communicate with counsel; and (3) attack the default judgment until eight months after it was entered, the trial court manifestly abused its discretion in granting the lessee's motion to set the default aside. *Kairos Peachtree Assocs., LLC v. Papadopoulos*, 288 Ga. App. 161, 653 S.E.2d 386 (2007).

Proper case must be made for default to be opened.

In light of the evidence that a company was not a proper party in interest to a slip and fall lawsuit, and that the company acted diligently before and after the default, the trial court did not abuse the court's broad discretion in accepting the company's explanation and opening the default under the "proper case" ground of O.C.G.A. § 9-11-55(b). *Strader v. Palladian Enters., LLC*, 312 Ga. App. 646, 719 S.E.2d 541 (2011).

Excusable neglect.

It was error to open a default against lenders under O.C.G.A. § 9-11-55(b) because the lenders had not shown excusable neglect. After sending the complaint to their attorney by e-mail, the lenders had not taken any action to confirm receipt of the e-mail by the attorney, who had not received the complaint and had not represented otherwise. *Flournoy v. Wells Fargo Bank, N.A.*, 289 Ga. App. 560, 657 S.E.2d 625 (2008).

As a communications company was served with a civil complaint and the company did not take steps to ensure that the complaint was forwarded to the company's insurer, resulting in the failure to answer the complaint and the automatic entry of a default judgment against the company pursuant to O.C.G.A. § 9-11-55(a), it was an abuse of discretion for a trial court to grant the company's

motion under § 9-11-55(b) to open the default, as there was no diligence shown by the company that supported a finding of excusable neglect. *BellSouth Telcoms., Inc. v. Future Communs., Inc.*, 293 Ga. App. 247, 666 S.E.2d 699 (2008).

Denial of request to open default not error.

Because the only explanation offered for the defendant's failure to file a timely answer was its belief that its partner was retaining local counsel, and there was no evidence to show that the defendant was diligent in its efforts to obtain or confirm representation by local counsel, the trial court's denial of the defendant's motion to open a default under O.C.G.A. § 9-11-55(b) was proper. *Constructamax, Inc. v. Andy Bland Constr., Inc.*, 280 Ga. App. 403, 634 S.E.2d 168 (2006).

The trial court did not err in denying a corporation's motion to open a default judgment against companies that it subsequently acquired, as although regional counsel for the companies had received timely notice that the complaint had been served, regional counsel had not retained local counsel to answer the complaint; even when regional counsel obtained an extension of time in which to answer, no answer was filed within the agreed-to extension, no additional extension was requested until after the time granted in the first extension had expired, and the motion to open the default was not filed until almost three months after the answer was due. *COMCAST Corp. v. Warren*, 286 Ga. App. 835, 650 S.E.2d 307 (2007), cert. denied, 2008 Ga. LEXIS 82 (Ga. 2008).

In a breach of contract suit seeking payment of commission for a real estate transaction, defaulting defendants were not entitled to reopen a default judgment under O.C.G.A. § 9-11-55(b) because their explanation that, although they had been served, "it was unclear what happened" did not establish a "proper case" to open the default. *Northpoint Group Holdings, LLC v. Morris*, 300 Ga. App. 491, 685 S.E.2d 436 (2009), cert. denied, No. S10C0368, 2010 Ga. LEXIS 349 (Ga. 2010).

Superior court did not err by denying a company's motion to open default because the motion was filed after a judgment had

been entered against the company, and since the company was in default as a matter of law when the company failed to timely respond to a habeas corpus petitioner's claims, the superior court was authorized to enter a default judgment; although the state's failure to timely respond to a petition for habeas corpus relief did not entitle the petitioner to a default judgment, the company was a private entity, and the relief granted to the petitioner pursuant to the default judgment was not in the nature of habeas relief. *Sentinel Offender Servs., LLC v. Harrelson*, 286 Ga. 665, 690 S.E.2d 831 (2010).

Trial court did not abuse the court's discretion in denying a corporation's motion to under O.C.G.A. § 9-11-55(b) to open and set aside the default judgment because the corporation made no showing that the trial court was substantively in error in rejecting the corporation's attempt to open the default under the "providential cause" or "excusable neglect" provisions of § 9-11-55(b); the trial court heard all of the evidence and determined that none of the grounds under § 9-11-55 were met, including that of a "proper case" being made for opening the default. *Cardinal Robotics, Inc. v. Moody*, 287 Ga. 18, 694 S.E.2d 346 (2010).

Opening default when multiple parties. — A trial court erred when the court denied a motion to open a default filed by one of two relatives claiming an undivided one-half interests in a property to which a third relative sought to quiet title. The liability of relatives one and two was joint, so the third relative was required to recover against both relatives one and two on the strength of the third relative's own title, and as the third relative was unable to prove a case against relative one, a default against relative two was improper. *Lord v. Holland*, 282 Ga. 890, 655 S.E.2d 602 (2008).

Indivisibility of judgments rule required setting aside of default judgment. — Trial court did not err in denying a contractor's motion to set aside a default judgment after the default judgment was set aside as to a second contract only because the indivisibility of judgments rule required that the joint judgment, if

set aside as to the second contractor, had to be set aside as to the first contractor as well; the setting aside of the judgment as to the second contractor was for reasons other than on the merits, and there remained a possibility that the second contractor's liability, if any, to a homeowner could be put in issue. *Merry v. Robinson*, 313 Ga. App. 321, 721 S.E.2d 567 (2011).

Default held properly opened.

In a personal injury action, and by reading O.C.G.A. § 9-11-15(a) in pari materia with O.C.G.A. § 9-11-21, because a plaintiff sued two parties, but substituted only one, the partnership originally sued was not required to file an answer absent an order from the court to do so, and hence could not be found in default; as a result, the trial court correctly found a proper case was made for the default to be opened. *Marwede v. EQR/Lincoln L.P.*, 284 Ga. App. 404, 643 S.E.2d 766 (2007), cert. denied, 2007 Ga. LEXIS 504 (Ga. 2007).

Entertainer and a security service were properly permitted to reopen a default under O.C.G.A. § 9-11-55(a) because they filed a sworn affidavit asserting that the answer was filed as soon as counsel obtained pro hac vice admission in the case, and there was no evidence of any trial delay or prejudice. *Herring v. Harvey*, 300 Ga. App. 560, 685 S.E.2d 460 (2009), cert. denied, No. S10C0389, 2010 Ga. LEXIS 305 (Ga. 2010).

Trial court did not err in allowing a lessee to open default pursuant to O.C.G.A. § 9-11-55(b) because each of the four conditions precedents to opening a prejudgment default had been met; the lessee filed an answer, announced ready to proceed to trial, and filed a sworn affidavit setting forth a meritorious defense, and the default was the result of a one day miscalculation of the due date, not of a failure to file an answer. *ABA 241 Peachtree, LLC v. Brooken & McGlothen, LLC*, 302 Ga. App. 208, 690 S.E.2d 514 (2010).

Trial court did not abuse the court's discretion by granting a wife's motion to open her default under O.C.G.A. § 9-11-55(b) and allowing a creditor's case against her to proceed on the merits because the record supported the trial court's conclusion that each of the four

conditions precedent for opening a default had been met; the wife believed that her attorney had filed an answer on her behalf, the attorney did file an answer on behalf of a debtor, the wife's husband, the parties proceeded with discovery, the wife immediately filed an answer and motion to open default once she realized that she was in default, and the creditor failed to establish any specific claim of prejudice resulting from the opening of default. *Thomas v. Brown*, 308 Ga. App. 514, 707 S.E.2d 900 (2011).

Defendants had right to open default when trial court prematurely entered default judgment. — Defendants in a RICO action failed to exercise the defendants' right to open a prematurely entered default judgment as a matter of right by filing an answer and costs within the 15-day period provided in O.C.G.A. § 9-11-55(a); instead, the defendants filed an appeal. However, defendants were permitted to bring a motion to open default under § 9-11-55(b). *Florez v. State*, 311 Ga. App. 378, 715 S.E.2d 782 (2011), cert. dismissed, 2012 Ga. LEXIS 64 (Ga. 2012).

Denial of motion to set aside default was reversible error. — Because a contractor presented sufficient evidence showing that an assignee that sued it had actual knowledge through its assignor of the contractor's physical address, yet failed to attempt service at that address before serving the Secretary of State, the trial court erred in denying the contractor's motion to set aside the default judgment entered in favor of the assignee. *TC Drywall & Plaster, Inc. v. Express Rentals, Inc.*, 287 Ga. App. 624, 653 S.E.2d 70 (2007).

The trial court did not err in opening a default judgment, as: (1) the movant satisfied the four conditions outlined under O.C.G.A. § 9-11-55(b); (2) the motion was verified and stated that the movant had responsive pleadings to file instant, was ready to proceed to trial, and had a meritorious defense; and (3) the movant contemporaneously filed a verified answer to the complaint setting out its defenses. *Patterson v. Bristol Timber Co.*, 286 Ga. App. 423, 649 S.E.2d 795 (2007).

Trial court erred in denying the county

school district employees' motion to set aside a default judgment entered against the employees under O.C.G.A. § 9-11-55(b) in the parents' wrongful death action because while the employees were sued in both the employees' official and individual capacities, the parents' wrongful-death suit arose from actions the employees took in the employees' official capacities as employees of the school, and thus, the trial court erred as a matter of law in finding that the entry of the default judgment barred the employees from being able to assert that official immunity protected the employees from the parents' wrongful death action; official immunity is not a mere defense but rather an entitlement not to be sued that must be addressed as a threshold matter before a lawsuit may proceed. *Cosby v. Lewis*, 308 Ga. App. 668, 708 S.E.2d 585 (2011).

Refusal to open default had nothing to do with ruling as to notice. — Analyzing a personal injury action filed against an insured, and a declaratory judgment action subsequently filed by its insurer, the Court of Appeals of Georgia erred in holding that an insured was estopped from asserting compliance with its insurer's policy provisions regarding notice, and additionally erred, on that basis, in reversing the denial of summary judgment to the insurer in its declaratory judgment action, as neither *res judicata* nor collateral estoppel barred inquiry into the question of whether the insureds' notice of a lawsuit to the insurer was timely; furthermore, even if the refusal to open the default was premised on the state court's finding that the insured failed to prove the merits of its claim of insufficiency of service of process, this still would not equate to a ruling that the insured failed to provide its insurer with adequate notice. *Karan, Inc. v. Auto-Owners Ins. Co.*, 280 Ga. 545, 629 S.E.2d 260 (2006).

Voluntary dismissal of joint tortfeasor did not void judgment against remaining defendants. — A voluntary dismissal with prejudice of an alleged joint tortfeasor did not void the judgment entered against the remaining defendants, but only adjudicated the liabilities of that party; as it neither terminated the action nor rendered the default

judgment void, the trial court did not err in refusing to set aside a default judgment. *Mateen v. Dicus*, 286 Ga. App. 760, 650 S.E.2d 272 (2007), 129 S. Ct. 89, 172 L.Ed.2d 30 (2008).

Failure to have registered agent for service not reason to open default. — Trial court did not abuse the court's discretion in deciding not to open a default judgment entered against a limited liability company under O.C.G.A. § 9-11-55(b) because the limited liability company offered no reasonable explanation for failing to maintain a proper registered agent for service of process. *Sierra-Corral Homes, LLC v. Pourreza*, 308 Ga. App. 543, 708 S.E.2d 17 (2011), cert. denied, No. S11C1121, 2011 Ga. LEXIS 584 (Ga. 2011).

2. As Matter of Right

Applicability to probate proceedings. — In a probate matter, a trial court erred by dismissing an executor's objection to the setting aside of certain real property as year's support in favor of an estate as the executor had filed an objection within 15 days of the default order amending the year's support order, pursuant to O.C.G.A. § 9-11-55(a), and by paying costs. The provisions of § 9-11-55(a) relating to the opening of default judgments as a matter of right within 15 days of default applied to year's support proceedings in probate court. In *re Estate of*

Ehlers, 289 Ga. App. 14, 656 S.E.2d 169 (2007).

3. At Any Time Before Judgment

Default should be opened if "reasonable excuse" for failing to answer is shown.

In a medical malpractice action against a hospital and four residents, a proper case was established for the hospital's default to be opened under O.C.G.A. § 9-11-55(b) when, upon discovering the default, the hospital acted promptly, the patient and family were not prejudiced as a result of the default being opened, and the hospital alleged a meritorious defense to the lawsuit. *Nelson v. Bd. of Regents of the Univ. Sys. of Ga.*, 307 Ga. App. 220, 704 S.E.2d 868 (2010).

Failure to answer complaint. — Trial court had jurisdiction over a home inspector, and the inspector was required under the Georgia Civil Practice Act, O.C.G.A. § 9-11-12(a), to file an answer to the purchaser's complaint within 30 days, but because the inspector failed to do so, the inspector was in default. *Strickland v. Leake*, 311 Ga. App. 298, 715 S.E.2d 676 (2011).

Once a final judgment is entered, etc.

In accord with *Archer v. Monroe*. See *Pine Tree Publishing, Inc. v. Community Holdings*, 242 Ga. App. 689, 531 S.E.2d 137 (2000).

RESEARCH REFERENCES

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article on appellate practice and procedure, see 60 *Mercer L. Rev.* 21 (2008). For annual survey of law on real property, see 62 *Mercer L. Rev.* 283 (2010).

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5. STANDING

General Consideration

Law of the case doctrine. — Because the law of the case doctrine did not apply to issues not previously ruled upon below, enumerated as error on appeal, or discussed in a prior appellate decision, the trial court erred in denying summary judgment to a boat's charterer, and partial summary judgment to both the charterer and the boat's owner, in an action arising out of injuries sustained by a longshoreman while on board a cargo ship, as the law of the case rule did not preclude consideration of the charterer's status and the issue of whether both were liable under the International Safety Management Code, as such were not previously addressed by the trial court. *Eastern Car Liner, Ltd. v. Kyles*, 280 Ga. App. 362, 634 S.E.2d 129 (2006).

Number of motions for summary judgment.

Nothing in O.C.G.A. § 9-11-56 limits the number of times a party may make a motion for summary judgment, even without proffering additional evidence, leaving

it within the trial judge's discretion to consider such motions. *Eastern Car Liner, Ltd. v. Kyles*, 280 Ga. App. 362, 634 S.E.2d 129 (2006).

Although court found that summary judgment was improperly granted, nothing in O.C.G.A. § 9-11-56 limited the number of times a party could make a motion for summary judgment; thus, upon remand, either party could file a motion for summary judgment and seek a determination based upon the evidence and standard for summary adjudication. *Gold Creek SL, LLC v. City of Dawsonville*, 290 Ga. App. 807, 660 S.E.2d 858 (2008).

When motion to dismiss is treated as motion for summary judgment.

In an action filed by children to recover damages for injuries sustained by their parent in a fall in a nursing home facility, a motion to dismiss the action for failure to state a claim filed by the center that operated the facility was converted to a motion for summary judgment and, on appeal, was to be reviewed as such; the children, as nonmovants, submitted docu-

mentary evidence in response to the motion, and, by doing so, in effect requested that the motion be converted into one for summary judgment and acquiesced in the trial court's decision not to give notice of the actual nature of the pending motion. *Gaddis v. Chatsworth Health Care Ctr., Inc.*, 282 Ga. App. 615, 639 S.E.2d 399 (2006).

Seventh Amendment right to jury trial not infringed. — Because the Seventh Amendment to the U.S. Constitution did not apply in state courts, and an insured's right to a jury trial thereunder was not infringed when genuine issues of material fact were lacking and disposition of the matter was best handled by way of summary judgment, the insured's Seventh Amendment right to a jury trial was not infringed; as a result, the insured failed to demonstrate any constitutional deprivation warranting a 42 U.S.C. § 1983 action. *Cuyler v. Allstate Ins. Co.*, 284 Ga. App. 409, 643 S.E.2d 783, cert. denied, 2007 Ga. LEXIS 510 (Ga. 2007).

Cited in *Dalton Paving & Constr., Inc. v. South Green Constr. of Ga., Inc.*, 284 Ga. App. 506, 643 S.E.2d 754 (2007); *Dierkes v. Crawford Orthodontic Care, P.C.*, 284 Ga. App. 96, 643 S.E.2d 364 (2007); *Harris v. Inn of Lake City*, 285 Ga. App. 521, 647 S.E.2d 277 (2007); *Clay v. Oxendine*, 285 Ga. App. 50, 645 S.E.2d 553 (2007); *Brookview Holdings, LLC v. Suarez*, 285 Ga. App. 90, 645 S.E.2d 559 (2007); *MCG Health, Inc. v. Barton*, 285 Ga. App. 577, 647 S.E.2d 81 (2007); *Kennedy v. Ga. Dep't of Human Res. Child Support Enforcement*, 286 Ga. App. 222, 648 S.E.2d 727 (2007); *McCullough v. Reyes*, 287 Ga. App. 483, 651 S.E.2d 810 (2007); *Hamburger v. PFM Capital Mgmt.*, 286 Ga. App. 382, 649 S.E.2d 779 (2007); *Kay-Lex Co. v. Essex Ins. Co.*, 286 Ga. App. 484, 649 S.E.2d 602 (2007); *Monfort v. Colquitt County Hosp. Auth.*, 288 Ga. App. 202, 653 S.E.2d 535 (2007); *Mooneyham v. Provident Auto Leasing Co.*, 288 Ga. App. 837, 655 S.E.2d 640 (2007); *Exel Transp. Servs. v. Sigma Vita, Inc.*, 288 Ga. App. 527, 654 S.E.2d 665 (2007); *Hous. Auth. v. Ellis*, 288 Ga. App. 834, 655 S.E.2d 621 (2007); *CDP Event Servs. v. Atcheson*, 289 Ga. App. 183, 656 S.E.2d 537 (2008); *Edwards v. Sewell*, 289

Ga. App. 128, 656 S.E.2d 246 (2008); *Beasley v. Northside Hosp., Inc.*, 289 Ga. App. 685, 658 S.E.2d 233 (2008); *Somers v. M.A.U., Inc.*, 289 Ga. App. 731, 658 S.E.2d 242 (2008); *Rachels v. Thompson*, 290 Ga. App. 115, 658 S.E.2d 890 (2008), cert. denied, 2008 Ga. LEXIS 778 (Ga. 2008); *Allstate Ins. Co. v. Sutton*, 290 Ga. App. 154, 658 S.E.2d 909 (2008); *Daniel v. Allstate Ins. Co.*, 290 Ga. App. 898, 660 S.E.2d 765 (2008); *Pazur v. Belcher*, 290 Ga. App. 703, 659 S.E.2d 804 (2008); *Roylston v. Bank of Am., N.A.*, 290 Ga. App. 556, 660 S.E.2d 412 (2008); *Alcatraz Media, LLC v. Yahoo! Inc.*, 290 Ga. App. 882, 660 S.E.2d 797 (2008); *Smith v. Stewart*, 291 Ga. App. 86, 660 S.E.2d 822 (2008); *McCray v. FedEx Ground Package Sys.*, 291 Ga. App. 317, 661 S.E.2d 691 (2008), cert. denied, 2008 Ga. LEXIS 664 (Ga. 2008); *Drew v. Istar Fin., Inc.*, 291 Ga. App. 323, 661 S.E.2d 686 (2008); *McLaine v. McLeod*, 291 Ga. App. 335, 661 S.E.2d 695 (2008); *Gardner v. Marcum*, 292 Ga. App. 369, 665 S.E.2d 336 (2008); *Rosado v. Rosado*, 291 Ga. App. 670, 662 S.E.2d 761 (2008); *Davis v. Harpagon Co., LLC*, 283 Ga. 539, 661 S.E.2d 545 (2008); *Miller v. Branch Banking & Trust Co.*, 292 Ga. App. 189, 663 S.E.2d 756 (2008); *Johnson v. GAPVT Motors, Inc.*, 292 Ga. App. 79, 663 S.E.2d 779 (2008); *Scott v. Bank of Am.*, 292 Ga. App. 34, 663 S.E.2d 386 (2008); *Secured Equity Fin., LLC v. Washington Mut. Bank, F. A.*, 293 Ga. App. 50, 666 S.E.2d 554 (2008); *Coote v. Branch Banking & Trust Co.*, 292 Ga. App. 164, 664 S.E.2d 554 (2008); *Zurich Am. Ins. Co. v. Beasley*, 293 Ga. App. 8, 666 S.E.2d 83 (2008); *Rooks v. Tenet Health Sys. GB, Inc.*, 292 Ga. App. 477, 664 S.E.2d 861 (2008); *Lee v. McCord*, 292 Ga. App. 707, 665 S.E.2d 414 (2008); *Rheem Mfg. v. Butts*, 292 Ga. App. 523, 664 S.E.2d 878 (2008); *Morrill v. Cotton States Mut. Ins. Co.*, 293 Ga. App. 259, 666 S.E.2d 582 (2008); *Bickerstaff Real Estate Mgmt., LLC v. Hanners*, 292 Ga. App. 554, 665 S.E.2d 705 (2008); *Greater Ga. Life Ins. Co. v. Eason*, 292 Ga. App. 682, 665 S.E.2d 725 (2008); *Weatherly v. Weatherly*, 292 Ga. App. 879, 665 S.E.2d 922 (2008); *Avion Sys. v. Thompson*, 293 Ga. App. 60, 666 S.E.2d 464 (2008); *Triple Net Props., LLC v. Burruss Dev. &*

Constr., Inc., 293 Ga. App. 323, 667 S.E.2d 127 (2008); McCall v. Couture, 293 Ga. App. 305, 666 S.E.2d 637 (2008); Partain v. Oconee County, 293 Ga. App. 320, 667 S.E.2d 132 (2008); Custer v. Coward, 293 Ga. App. 316, 667 S.E.2d 135 (2008); AMLI Residential Props. v. Ga. Power Co., 293 Ga. App. 358, 667 S.E.2d 150 (2008); Harris Ins. Agency, Inc. v. Tarene Farms, LLC, 293 Ga. App. 430, 667 S.E.2d 200 (2008); Kinzy v. Farmers Ins. Exch., 293 Ga. App. 509, 667 S.E.2d 673 (2008); Am. Teleconferencing Servs. v. Network Billing Sys., LLC, 293 Ga. App. 772, 668 S.E.2d 259 (2008); Bullington v. Blakely Crop Hail, Inc., 294 Ga. App. 147, 668 S.E.2d 732 (2008); DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 668 S.E.2d 737 (2008); Schofield Interior Contrs., Inc. v. Std. Bldg. Co., 293 Ga. App. 812, 668 S.E.2d 316 (2008); City of Decatur v. DeKalb County, 284 Ga. 434, 668 S.E.2d 247 (2008); Dennis v. First Nat'l Bank of the S., 293 Ga. App. 890, 668 S.E.2d 479 (2008); Coleman v. Arrington Auto Sales & Rentals, 294 Ga. App. 247, 669 S.E.2d 414 (2008); Lawyers Title Ins. Corp. v. Stribling, 294 Ga. App. 382, 670 S.E.2d 154 (2008); Savage v. E. R. Snell Contr., Inc., 295 Ga. App. 319, 672 S.E.2d 1 (2008); Dyess v. Brewton, 284 Ga. 583, 669 S.E.2d 145 (2008); De Castro v. Durrell, 295 Ga. App. 194, 671 S.E.2d 244 (2008); Mullis v. Bibb County, 294 Ga. App. 721, 669 S.E.2d 716 (2008); C & H Dev., LLC v. Franklin County, 294 Ga. App. 792, 670 S.E.2d 491 (2008); DeSarno v. Jam Golf Mgmt., LLC, 295 Ga. App. 70, 670 S.E.2d 889 (2008); Pruette v. Phoebe Putney Mem. Hosp., 295 Ga. App. 335, 671 S.E.2d 844 (2008); Creeden v. Fuentes, 296 Ga. App. 96, 673 S.E.2d 611 (2009); Lamb v. Fulton-DeKalb Hosp. Auth., 297 Ga. App. 529, 677 S.E.2d 328 (2009); Kitchen v. Insuramerica Corp., 296 Ga. App. 739, 675 S.E.2d 598 (2009); Russell v. Barrett, 296 Ga. App. 114, 673 S.E.2d 623 (2009); Iwan Renovations, Inc. v. N. Atlanta Nat'l Bank, 296 Ga. App. 125, 673 S.E.2d 632 (2009); Calloway v. City of Fayetteville, 296 Ga. App. 200, 674 S.E.2d 66 (2009); Davis v. MARTA, 296 Ga. App. 355, 674 S.E.2d 627 (2009); Safe Shield Workwear, LLC v. Shubee, Inc., 296 Ga. App. 498, 675 S.E.2d 249 (2009); Hanson Staple Co. v.

Eckelberry, 297 Ga. App. 356, 677 S.E.2d 321 (2009); Am. Nat'l Prop. & Cas. Co. v. Amerieast, Inc., 297 Ga. App. 443, 677 S.E.2d 663 (2009); Haugabook v. Crisler, 297 Ga. App. 428, 677 S.E.2d 355 (2009); Gettner v. Fitzgerald, 297 Ga. App. 258, 677 S.E.2d 149 (2009); Lehman v. Keller, 297 Ga. App. 371, 677 S.E.2d 415 (2009); Henderson v. Sargent, 297 Ga. App. 504, 677 S.E.2d 709 (2009); Ins. Co. of Pa. v. APAC-Southeast, Inc., 297 Ga. App. 553, 677 S.E.2d 734 (2009); Hicks v. Heard, 297 Ga. App. 689, 678 S.E.2d 145 (2009); Riding v. Ellis, 297 Ga. App. 740, 678 S.E.2d 178 (2009); Auto-Owners Ins. Co. v. State Farm Fire & Cas. Co., 297 Ga. App. 751, 678 S.E.2d 196 (2009); Tookes v. Murray, 297 Ga. App. 765, 678 S.E.2d 209 (2009); Lee v. Phoebe Putney Mem. Hosp., Inc., 297 Ga. App. 692, 678 S.E.2d 340 (2009); Abdul-Malik v. AirTran Airways, Inc., 297 Ga. App. 852, 678 S.E.2d 555 (2009); Greenhorne & O'Mara, Inc. v. City of Atlanta, 298 Ga. App. 261, 679 S.E.2d 818 (2009); Mason v. Allstate Ins. Co., 298 Ga. App. 308, 680 S.E.2d 168 (2009); Grange Mut. Cas. Co. v. Snipes, 298 Ga. App. 405, 680 S.E.2d 438 (2009); Keyingham Invs., LLC v. Fid. Nat'l Title Ins. Co., 298 Ga. App. 467, 680 S.E.2d 442 (2009); Yim v. J's Fashion Accessories, Inc., 298 Ga. App. 399, 680 S.E.2d 466 (2009); McGregor v. Columbia Nat'l Ins. Co., 298 Ga. App. 491, 680 S.E.2d 559 (2009); Weaver v. Pizza Hut of Am., Inc., 298 Ga. App. 645, 680 S.E.2d 668 (2009); Leo v. Waffle House, Inc., 298 Ga. App. 838, 681 S.E.2d 258 (2009); Rushin v. Ussery, 298 Ga. App. 830, 681 S.E.2d 263 (2009); Summit Auto. Group, LLC v. Clark Kia Motors Ame., Inc., 298 Ga. App. 875, 681 S.E.2d 681 (2009); Buckler v. DeKalb County Bd. of Comm'rs, 299 Ga. App. 465, 683 S.E.2d 22 (2009); Irvin Int'l, Inc. v. Riverwood Int'l Corp., 299 Ga. App. 633, 683 S.E.2d 158 (2009); Gallagher v. Buckhead Cmty. Bank, 299 Ga. App. 622, 683 S.E.2d 50 (2009); Quarles v. Quarles, 285 Ga. 762, 683 S.E.2d 583 (2009); Jones v. City of Willacoochee, 299 Ga. App. 741, 683 S.E.2d 683 (2009); Reynolds Props. v. Bickelmann, 300 Ga. App. 484, 685 S.E.2d 450 (2009); OnBrand Media v. Codex Consulting, Inc., 301 Ga. App. 141, 687 S.E.2d 168 (2009); Textile Rubber & Chem. Co. v.

Thermo-Flex Techs., Inc., 301 Ga. App. 491, 687 S.E.2d 919 (2009); Solley v. Mullins Trucking Co., 301 Ga. App. 565, 687 S.E.2d 924 (2009); Hollis & Spann, Inc. v. Hopkins, 301 Ga. App. 29, 686 S.E.2d 817 (2009); Northland Ins. Co. v. Am. Home Assur. Co., 301 Ga. App. 726, 689 S.E.2d 87 (2009); Stefano Arts v. Sui, 301 Ga. App. 857, 690 S.E.2d 197 (2010); Kaplan v. City of Sandy Springs, 286 Ga. 559, 690 S.E.2d 395 (2010); Drury v. Harris Ventures, Inc., 302 Ga. App. 545, 691 S.E.2d 356 (2010); Dixie Group, Inc. v. Shaw Indus. Group, 303 Ga. App. 459, 693 S.E.2d 888, cert. denied, No. S10C1241, 2010 Ga. App. LEXIS 659; cert. denied, No. S10C1302, 2010 Ga. App. LEXIS 730 (Ga. 2010); Jones v. O'Day, 303 Ga. App. 159, 692 S.E.2d 774 (2010); Baker v. Harcon, Inc., 303 Ga. App. 749, 694 S.E.2d 673 (2010); Powerhouse Custom Homes, Inc. v. 84 Lumber Co., L.P., 307 Ga. App. 605, 705 S.E.2d 704 (2011); AAF-McQuay, Inc. v. Willis, 308 Ga. App. 203, 707 S.E.2d 508 (2011); Lewis v. Ritz Carlton Hotel Co., LLC, 310 Ga. App. 58, 712 S.E.2d 91 (2011); Karle v. Belle, 310 Ga. App. 115, 712 S.E.2d 96 (2011); Davis v. Foreman, 311 Ga. App. 775, 717 S.E.2d 295 (2011); Jones v. White, 311 Ga. App. 822, 717 S.E.2d 322 (2011); Griffin v. State Bank, 312 Ga. App. 87, 718 S.E.2d 35 (2011); In re Estate of Tapley, 312 Ga. App. 234, 718 S.E.2d 92 (2011); Aleman v. Sugarloaf Dialysis, LLC, 312 Ga. App. 658, 719 S.E.2d 551 (2011); Hays v. Ga. Farm Bureau Mut. Ins. Co., 314 Ga. App. 110, 722 S.E.2d 923 (2012); Sands v. Lindsey, 314 Ga. App. 160, 723 S.E.2d 471 (2012); Trendmark Homes, Inc. v. Bank of N. Ga., No. A11A1653, 2012 Ga. App. LEXIS 296 (Mar. 19, 2012); Boatright v. Glynn County Sch. Dist., No. A11A2308, 2012 Ga. App. LEXIS 322 (Mar. 22, 2012); Amtrust North Am., Inc. v. Smith, No. A11A1645, 2012 Ga. App. LEXIS 333 (Mar. 26, 2012).

Applicability to Certain Actions, Proceedings, Issues, and Defenses

Attorney fees.

In an action to recover on a promissory note with past due interest, and upon entering summary judgment in favor of the lender, the trial court erred in award-

ing the lender \$10,195.40 in attorney fees in a judgment in which the principal and interest amounted to only \$6,259.12; under the formula delineated under O.C.G.A. § 13-1-11, such amount was limited to \$650.91. Long v. Hogan, 289 Ga. App. 347, 656 S.E.2d 868 (2008), cert. denied, 2008 Ga. LEXIS 516 (Ga. 2008).

The evidence supported an award of attorney fees because the evidence presented by the client in a legal malpractice suit could authorize a jury to conclude that, despite owing the client a fiduciary duty, the attorney's persistent failure to adequately represent the client went beyond mere negligence and rose to the level of bad faith. Brito v. Gomez Law Group, LLC, 289 Ga. App. 625, 658 S.E.2d 178 (2008).

Breach of fiduciary duty.

Summary judgment was inappropriate in a breach of fiduciary duty action which centered around a verbal settlement agreement, as material fact issues remained as to whether: (1) a company's offer to buy the minority shareholders' stock required a written purchase agreement; (2) the parties agreed to all material terms; and (3) a note signed by one of the minority shareholders had been cancelled. McKenna v. Capital Res. Partners, IV, L.P., 286 Ga. App. 828, 650 S.E.2d 580 (2007), cert. denied, 2007 Ga. LEXIS 752, 763 (Ga. 2007).

Because a claim filed by a minority shareholder against the officers and directors of a corporation alleging their depletion of corporate assets through excessive salaries related to the value or price the shareholder would receive in a stock appraisal action, the shareholder's exclusive remedy was within that action; thus, a separate breach of fiduciary duty claim filed in the shareholder's direct action against the officers and directors was properly disposed of via summary judgment. Levy v. Reiner, 290 Ga. App. 471, 659 S.E.2d 848 (2008).

Recoupment. — In an action seeking a writ of possession for a mobile home, because the mobile home's tenants expressly waived any recourse against their bankrupt lender arising from a prior judgment, based on a voluntary settlement with the bankrupt lender accepting a general un-

secured claim, the tenants could not later assert any right of recoupment; as a result, the trial court did not err in granting summary judgment as to said claim against the tenants and in favor of a successor lender. *Hill v. Green Tree Servicing, LLC*, 280 Ga. App. 151, 633 S.E.2d 451 (2006).

Acts of employees.

Trial court properly granted an employer's motion for summary judgment, in a personal injury action filed by a mother and daughter, as the latter failed to show that the former was liable under the doctrine of respondeat superior for the accident caused by its employee, given that the employee was running personal errands at the time of the collision, despite the fact the errands seemed work-related, and was not on a special mission undertaken at the employer's direction; further, any reliance by the mother and daughter on the traveling salesman exception applied in workers' compensation cases was misplaced. *Gassaway v. Precon Corp.*, 280 Ga. App. 351, 634 S.E.2d 153 (2006).

In a negligent hiring and supervision suit based on respondeat superior filed by a decedent's wife against an employer and its allegedly negligent employee, the trial court properly denied an employer's motion for summary judgment, given that the evidence was in dispute as to whether said employee was acting in the scope of employment at the time of the fatal injury to the decedent, and whether the employee might have foreseen that some injury would have resulted from an act or omission, or that consequences of a generally injurious nature might have been expected, based upon evidence that in the 22 years that the employee had driven for companies owned by the same people, the employee had received two speeding tickets and was involved in two minor car accidents. *Remediation Res., Inc. v. Balding*, 281 Ga. App. 31, 635 S.E.2d 332 (2006).

In a personal injury action, the trial court properly granted summary judgment to an employer on the issue of respondeat superior, as the employer could not be found liable for its employee's personal actions undertaken at the time of the collision, which were not in further-

ance of the employer's interests, and were not within the employee's scope of employment nor ratified by the employer. *Hankerson v. Hammett*, 285 Ga. App. 610, 647 S.E.2d 319 (2007).

In a personal injury action arising from an auto accident, summary judgment to an employer was reversed, as an injured driver presented some evidence showed that at the time of the accident the employer's employee might have been on a work-related cell phone call or distracted by such a call that the employee chose not to answer, creating a jury question as to the employer's liability for the employee's actions. *Hunter v. Modern Cont'l Constr. Co.*, 287 Ga. App. 689, 652 S.E.2d 583 (2007).

In a tort action filed by an executrix against a hospital, the latter was properly granted summary judgment on a claim of medical battery, as the undisputed facts supported an inference that the executrix's mother consented to the nursing staff determining what types of food the mother could tolerate, and as a result the nursing staff's conduct in exercising that discretion in deciding what types of food the mother could eat did not support a medical battery claim. *Morton v. Wellstar Health Sys.*, 288 Ga. App. 301, 653 S.E.2d 756 (2007), cert. denied, 2008 Ga. LEXIS 292 (Ga. 2008).

County sheriff's authority over county-owned property. — County sheriff had the independent authority to repaint and remark county-owned sheriff's vehicles assigned to the sheriff's exclusive use, but lacked said authority to modify portions of a county-owned building in which the sheriff's office and jail were housed, as said facility was shared with the superior, state, and magistrate courts of Clayton County, as well as the clerks of those courts, the solicitor general, and the district attorney, and hence, not under the sheriff's exclusive use. As a result, subject to compliance with O.C.G.A. § 40-8-91, summary judgment in favor of the county as to the extent of the sheriff's authority was reversed as to the former, but affirmed as to the latter. *Hill v. Clayton County Bd. of Comm'rs*, 283 Ga. App. 15, 640 S.E.2d 638 (2006).

Federal Employers' Liability Act. — Trial court erroneously granted summary

judgment to an employer, upon a employee's claim for benefits under the Federal Employers' Liability Act, for injuries to the right leg, right knee, and right ankle, given the evidence substantiating these injuries and that the employer was placed on some kind of notice regarding the same; but, summary judgment was upheld as to claims for benefits regarding the employee's injuries to both arms, wrists, hands, feet, left ankle, and left knee, as no evidence substantiating the same, or as to medical causation, was presented. *Phelps v. CSX Transp., Inc.*, 280 Ga. App. 330, 634 S.E.2d 112 (2006).

Equitable subrogation. — In an action seeking a declaration that a bank held a first priority lien against certain real property that a trust purchased at a non-judicial foreclosure sale, because the trust failed in its burden to show that, as a matter of law, the application of the principle of equitable subrogation would impair its superior or equal equity, or that it would be unduly prejudiced thereby; and similarly failed to show that the bank was culpably and inexcusably negligent. the trial court did not err in denying the trust's motion for summary judgment. *Greer v. Provident Bank, Inc.*, 282 Ga. App. 566, 639 S.E.2d 377 (2006).

Adverse possession by private party. — The trial court properly granted summary judgment to the grantor's grandchildren, as they held the disputed parcel of property under color of title, via a deed to the grantor's daughter, albeit the fact that such was not effective as a deed conveying a present interest, for the prescription period of seven years, and the grantor's heirs at law did not contest the deed until suit was filed. *Matthews v. Crowder*, 281 Ga. 842, 642 S.E.2d 852 (2007).

Easement.

Trial court erred in granting a couple's motion for summary judgment, in an action against a landowner declaring that a warranty deed included an express easement across the landowner's land, as the language contained within the deed failed to contain any means of identifying the quantity, dimensions, or location of the easement intended to be conveyed, and a survey failed to show the same; thus, the

express easement sought to be conveyed was void for vagueness and unenforceable. *Smith v. Tolar*, 281 Ga. App. 406, 636 S.E.2d 112 (2006).

Because a buyer's proposed landfill would not be a public utility, but would be privately-owned, it was not entitled to a written verification of zoning compliance so it could pursue a state permit to build a landfill; hence, when combined with the fact that the county did not violate the provisions of the Open Meetings Act under O.C.G.A. § 50-14-1(d), the county was properly granted summary judgment as to these issues. *EarthResources, LLC v. Morgan County*, 281 Ga. 396, 638 S.E.2d 325 (2006).

In an action arising from the sale of property, the trial court erred in granting summary judgment to the sellers, contrary to both O.C.G.A. §§ 44-5-62 and 44-5-63, as a floodwater detention easement burdened the property by permitting the impoundment of water on it to prevent flooding or increased water runoff on other property located downstream, and, even though the lake was certainly open and obvious, the same could not necessarily be said of the easement; moreover, a factual issue remained as damages, and although the buyers' constructive notice of the easement by reason of its recordation within the chains of title would provide a compelling reason for exempting the easement from operation of the warranty deed, O.C.G.A. § 44-5-63 provided otherwise. *McMurray v. Housworth*, 282 Ga. App. 280, 638 S.E.2d 421 (2006).

Because the record contained no evidence that a neighboring landowner's predecessor in interest, or its agents, used the road continuously for at least 20 years, the predecessor did not acquire a private way by prescription and hence, the neighbor lacked any private way by prescription over a landowner's property to clear timber and remove barbed wire from the roadway without committing a trespass; hence, the trial court did not err in granting the landowner summary judgment as to the issue of trespass. *Norton v. Holcomb*, 285 Ga. App. 78, 646 S.E.2d 94 (2007), cert. denied, 2007 Ga. LEXIS 654 (Ga. 2007).

Because genuine issues of material fact remained as to whether a lessee's failure to reserve an easement to the subject property at the time the lessee executed a corrective quitclaim deed was otherwise unreasonable, foreclosing the condemnation action, partial summary judgment to the lessee was unwarranted. *Wright v. Brookshire*, 286 Ga. App. 162, 648 S.E.2d 485 (2007).

Pursuant to an expressed dedication involving land owned by an adjacent landowner and a neighbor, the trial court properly granted summary judgment in favor of the neighbor as the declaration authorized the neighbor to rearrange their own building and parking spaces as long as the easement was maintained. *Wilcox Holdings, Ltd. v. Hull*, 290 Ga. App. 179, 659 S.E.2d 406 (2008).

Because the language of an easement agreement between two adjacent commercial landowners was ambiguous, parol evidence was admissible to show the parties' intent. Thus, questions of fact remained regarding intent, making summary judgment inappropriate. *McGuire Holdings, LLLP v. TSQ Partners, LLC*, 290 Ga. App. 595, 660 S.E.2d 397 (2008).

Action between adjoining landowners. — In a suit between two landowners to enforce the terms of an easement, while no error resulted from an order striking certain affidavits in support of a second landowner's claim for reimbursement for its grading work, genuine material fact issues precluded summary judgment on this claim. Further, summary judgment was unwarranted as to the issue of whether the second landowner was entitled to use a detention pond on the first landowner's property. *McGuire Holdings, LLLP v. TSQ Partners, LLC*, 290 Ga. App. 595, 660 S.E.2d 397 (2008).

Verbal contracts.

Sellers were properly granted summary judgment in an action filed by a buyer arising out of an oral land sales contract, given that: (1) no evidence of the buyer's partial performance existed sufficient to remove said contract from the statute of frauds; (2) a wetlands study and interest rate negotiation were not a part of the same; and (3) a later negotiated contract was an arm's length transaction, the price

of which was negotiated at the time, and hence, did not relate to the original contract. *Payne v. Warren*, 282 Ga. App. 524, 639 S.E.2d 528 (2006).

In light of the unresolved facts as to whether a monetary transfer between the parties, evidenced by an oral agreement, was either a loan or an investment, and the borrowers failed to affirmatively disprove the lender's claim that the transfer was a loan as alleged in the complaint, the trial court erred in granting summary judgment to the borrowers. *Marcum v. Gardner*, 283 Ga. App. 453, 641 S.E.2d 678 (2007).

Because a buyer's direct and uncontroverted evidence sufficiently showed the existence of an enforceable oral agreement for a dealer to sell to the buyer a rare Mercedes-Benz, with the price term being the manufacturer's suggested retail price ultimately arrived at by the manufacturer, and the dealer's circumstantial evidence failed to create a genuine issue of material fact regarding the price, the buyer satisfied the burden required to support an order granting summary judgment in the buyer's favor. *Jones v. Baran Co., LLC*, 290 Ga. App. 578, 660 S.E.2d 420 (2008).

Contracts.

Trial court did not err in dismissing a nine-count complaint filed by two uninsured patients, for failing to state a claim and treated as a motion for summary judgment, alleging that a health care provider overcharged them for medical care the received at rates grossly in excess of the rates charged to private medical insurers, or to Medicare/Medicaid benefit programs, as the parties entered into a valid contract, which the provider did not breach, and the patients failed to support their claims that the provider committed an unfair trade practice or breached a fiduciary duty owed to them. *Morrell v. Wellstar Health Sys., Inc.*, 280 Ga. App. 1, 633 S.E.2d 68 (2006).

In a dealer's action for breach of contract and trespass to chattel against two buyers following the buyers' purchase of a vehicle, the trial court properly granted summary judgment to the dealer, as the buyers' breach of contract, trespass to chattel, and default on the purchase

agreement essentially waived any right they had to arbitrate the dispute; moreover, an appeal as to the propriety of the supersedeas bond imposed was dismissed as moot. *Almonte v. West Ashley Toyota*, 281 Ga. App. 808, 637 S.E.2d 755 (2006), cert. denied, 2007 Ga. LEXIS 71 (2007).

In a buyer's suit arising out of a failed deal to sell the seller's business seeking damages for breach of contract and specific performance, the trial court erred in granting summary judgment to the sellers, as construction of the plain language of an addendum to the parties' letter of intent to sell the business showed that the parties had reached a binding agreement on all material terms concerning the purchase and sale of said business. *Goobich v. Waters*, 283 Ga. App. 53, 640 S.E.2d 606 (2006).

Based on the application of a merger clause in an expressed and lawful property sales contract, and the clear and unambiguous intent not to hold the lenders liable for transactions concerning the conveyance of a beach house made as consideration supporting the sale, summary judgment was properly granted to the lenders on the sellers' claims of fraud, concealment, breach of contract and unjust enrichment filed against them. *Donchi, Inc. v. Robdol, LLC*, 283 Ga. App. 161, 640 S.E.2d 719 (2007).

Trial court did not err in awarding summary judgment to the State Medical Education Board, making a student liable for both the amount of the scholarship received and attorney's fees, as: (1) estopels were disfavored under Georgia law; (2) the student came forward with no more than hearsay to support a claim that oral misrepresentations of fact were made regarding the scholarship; (3) the contract was not rescinded by either party; (4) no mutual mistake of fact was found; and (5) any impossibility in performing the contract was personal to the student. *Calabro v. State Med. Educ. Bd.*, 283 Ga. App. 113, 640 S.E.2d 581 (2006).

Because a buyer failed to comply with provisions of its contract with a seller requiring written notice of a breach, this failure barred it from relying on the seller's alleged breach of the agreement as a basis for its refusal to close and demand

for refund of the earnest money; but, because the seller complied with the notice provision by notifying the buyer that its refusal to close placed it in breach or default of the agreement and that the buyer had 15 days to cure the breach or default, upon the buyer's failure to do so, it was entitled to summary judgment and to retain the earnest money as liquidated damages. *Pillar Dev., Inc. v. Fuqua Constr. Co.*, 284 Ga. App. 858, 645 S.E.2d 64 (2007), cert. denied, 2007 Ga. LEXIS 669 (Ga. 2007).

Under the same transaction test, because the claims raised by a buyer in a Georgia state court were judicially determined in litigation between the parties in both the federal district court and the federal circuit court of appeals, and also sought redress for the same wrongs, the state court did not err in denying the buyer's partial summary judgment motion regarding the same. *BKJB P'ship v. Moseman*, 284 Ga. App. 862, 644 S.E.2d 874, cert. denied, 2007 Ga. LEXIS 558 (Ga. 2007).

Upon construction of a contract between an independent contractor and a billboard owner under O.C.G.A. § 13-2-2, because: (1) it was clear that the contractor did not waive any right to recover against the owner under any possible scenario, but only waived a right to recover against the owner's predecessor for damages if the waiver did not invalidate the insurance coverage; and (2) the contract only waived the owner's liability if the waiver did not invalidate the contractor's insurance, summary judgment was erroneously entered to the owner on grounds that the contractor waived a right to recover from the owner and because the trial court failed to consider whether the waiver invalidated the contractor's insurance. *Holmes v. Clear Channel Outdoor, Inc.*, 284 Ga. App. 474, 644 S.E.2d 311 (2007).

While the trial court properly found that a separate and independent contract made the subject of the buyers' breach of contract counterclaim against the seller was unenforceable, supporting summary judgment for the seller on the buyers' counterclaim, it erred in finding that the buyers' denial of any liability to the seller on the seller's complaint was insufficient;

thus, the seller was not entitled to summary judgment on its complaint for payment under a consignment contract and for attorney fees. *Jones v. Equip. King Int'l*, 287 Ga. App. 867, 652 S.E.2d 811 (2007).

In an action to recover under an indemnity agreement, because the undisputed facts showed that a party was estopped from denying the validity of a bond, and that the party indemnified a surety for payments made thereunder, the surety was properly granted summary judgment as to the party's liability for monies paid under the bond. *Samda Inv. Group, LLC v. Western Sur. Co.*, 287 Ga. App. 235, 651 S.E.2d 152 (2007).

On appeal from an order granting a broker's customer summary judgment in the broker's breach of contract action, because the merger doctrine did not apply to the fee contract involving a broker and the customer and the loan contract between the lender and the customer, and material fact issues remained as to the compensation due to the broker, and as to what effect, if any, a modification of the amount of the broker's fee had on its fee agreement with its customer, summary judgment in the customer's favor was reversed. *Atlanta Integrity Mortg., Inc. v. Ben Hill United Methodist Church, Inc.*, 286 Ga. App. 795, 650 S.E.2d 359 (2007).

In an action arising from an alleged breach of a non-solicitation covenant within a consultant agreement, because the employee subject to the covenant understood such to apply only to those clients the employee's employer acquired when it bought the employee's former company, or with whom the employee had material contact during the course of said employment, the trial court misconstrued the agreement by limiting its scope, and the employer was erroneously granted summary judgment based on the employee's alleged breach. *Atl. Ins. Brokers, LLC v. Slade Hancock Agency, Inc.*, 287 Ga. App. 677, 652 S.E.2d 577 (2007).

While the trial court did not err in entering an order granting partial summary judgment to a city on its breach of contract claim against a county and its tax commissioner, ruling that the latter breached their contract to bill, collect, and

remit ad valorem taxes on the city's behalf, because the county was not given adequate notice that the trial court would address the amount of damages incurred by the city as a result of the county's breach, the grant of summary judgment as to the damages issue was reversed on due process grounds. *Ferdinand v. City of East Point*, 288 Ga. App. 152, 653 S.E.2d 529 (2007), cert. denied, 2008 Ga. LEXIS 213 (Ga. 2008).

In a breach of contract action filed by a school against an enrolled student's parents seeking payment of a full year's tuition, the trial court properly granted summary judgment to the school, as the parents failed in their burden of showing that a liquidated damages clause in the contract amounted to an unenforceable penalty. *Turner v. Atlanta Girls' Sch., Inc.*, 288 Ga. App. 115, 653 S.E.2d 380 (2007).

The trial court properly granted summary judgment to an attorney in the attorney's action to collect fees due under a written fee agreement with a former client as the attorney provided the services outlined within the contract, and the former client failed to produce any competent evidence supporting an affirmative defense of failure of consideration after the attorney made a prima facie case for summary judgment. *Browning v. Alan Mullinax & Assocs., P.C.*, 288 Ga. App. 43, 653 S.E.2d 786 (2007).

In an action arising from the sale of a condominium unit, the trial court did not err in denying the owners' summary judgment motion on its claim of a right of first refusal, as it had no such right, but the owner was properly granted summary judgment on the buyer's claims of tortious interference with contractual and business relations and for punitive damages, as the owner had a legitimate right to protect when it voted on the sale of the subject unit. *Quality Foods, Inc. v. Smithberg*, 288 Ga. App. 47, 653 S.E.2d 486 (2007), cert. denied, 2008 Ga. LEXIS 316 (Ga. 2008).

Because the third party failed to present sufficient evidence supporting that party's position that the third party had a right, as successor in interest, to sue on a creditor's account with the creditor's debtor in order to support the third party's

right, summary judgment in the third party's favor in a suit against the debtor was erroneously entered. *Ponder v. CACV of Colo., LLC*, 289 Ga. App. 858, 658 S.E.2d 469 (2008).

Guaranty contract.

In an action to collect unpaid rent and fees owed by a lessee to a lessor under a lease agreement, the trial court properly granted partial summary judgment to the lessor, and against the lessee and the lessee's guarantor, as: (1) the language in the lease could not be construed to limit or modify the guarantor's pre-existing obligations under the guaranty through the time of the guarantor's revocation of the same; and (2) the language of the guaranty, standing alone, was unambiguous and created an unconditional, continuing guaranty. *The Cupboard, LLC v. Sunshine Travel Ctr.*, 283 Ga. App. 34, 640 S.E.2d 584 (2006).

In an action on a guaranty, because the plain and unambiguous terms of the guaranty and its addendum only obligated the guarantor to the lease obligations of the original tenant, who was also the guarantor's subsidiary, and not the obligations of a new tenant, the guarantor was properly absolved of any liability to the landlord for the obligations of that new tenant, entitling it to summary judgment on that issue. *Highwoods Realty L.P. v. Cmty. Loans of Am., Inc.*, 288 Ga. App. 226, 653 S.E.2d 807 (2007).

Successor in interest tax liability.

Order granting summary judgment on the issue of a successor in interest's liability for unpaid taxes in favor of said successor was reversed, as the successor failed to protect itself from successor liability for the unpaid sales and use taxes owed by its predecessor under O.C.G.A. § 48-8-46, and the successor failed to protect itself against unrecorded tax liens to the extent allowed by the statute. *Graham v. JD Design Group, Inc.*, 281 Ga. App. 347, 636 S.E.2d 66 (2006).

Breach of car dealership agreement.

Absent a confidential relationship between a lienholder and a prospective buyer of a vehicle subject to a lien, and absent any duty on the lienholder to disclose any problems with the vehicle's title

to the buyer, the lienholder was properly granted summary judgment on the buyer's negligence, fraudulent concealment, and derivative claim for punitive damages. *Lilliston v. Regions Bank*, 288 Ga. App. 241, 653 S.E.2d 306 (2007), cert. denied, 2008 Ga. LEXIS 275 (Ga. 2008).

Georgia Land Sales Act. — Trial court properly granted summary judgment against a home buyer's claim that the sale of the property at issue failed to comply with the Georgia Land Sales Act (Act), O.C.G.A. § 44-3-1 et seq., as the property contained a house suitable for occupancy at the time of the sale; further, despite the buyer's argument that the statutory exemption under O.C.G.A. § 44-3-4(2) did not apply to residential property, giving the words of the exemption their plain and ordinary meaning, the exemption had to be read as excluding from the Act property upon which either a commercial building, an industrial building, a condominium, a shopping center, a house or an apartment house was situated. *Mancuso v. Steyaard*, 280 Ga. App. 300, 640 S.E.2d 50 (2006).

Land sales contracts. — In an action between a buyer and a seller arising out of a land sales contract, because a question of material fact remained as to whether the failure to close was the buyer's fault, and because both an oral waiver and waiver by conduct could be inferred, the trial court erred in granting summary judgment to the seller. *Miller v. Coleman*, 284 Ga. App. 300, 643 S.E.2d 797 (2007).

Trial court erred in granting summary judgment to a home seller and against a realtor in construing the unambiguous language in the brokerage agreement at issue, which was for a definite term and was not terminable at will; moreover, although a sale was not consummated, the realtor remained entitled to its six percent commission, and the seller remained obligated to pay that amount, which was the proper measure of damages. *Ben Farmer Realty, Inc. v. Owens*, 286 Ga. App. 678, 649 S.E.2d 771 (2007), cert. denied, 2008 Ga. LEXIS 81 (Ga. 2008).

In an action arising out of an alleged breach of a land sales contract, given that the trial court relied on findings of fact that had been resolved only in the context

of the ruling on an interlocutory injunction filed by the buyer, and that issues of material fact plainly remained as to whether the seller fulfilled the contractual obligations to designate land adjacent to the buyer's property for use as a city or county road, the trial court's grant of summary judgment to the seller had to be reversed. *Taylor v. Thomas*, 286 Ga. App. 27, 648 S.E.2d 426 (2007).

In an action filed by a trust and its trustee against a school board alleging breach of a real estate contract, or in the alternative, specific performance of the contract at a reduced purchase price, summary judgment in favor of the school board was reversed on the breach of contract claim; however, summary judgment on the specific performance claim was affirmed, as the trust failed to tender the full purchase price, which was a prerequisite to a specific performance demand, the trust was not excused from doing so, and a tender would not have been futile. *Peaches Land Trust v. Lumpkin County Sch. Bd.*, 286 Ga. App. 103, 648 S.E.2d 464 (2007).

In a dispute over installment contract to purchase land, because evidence sufficiently showed that a buyer partially performed a subsequent oral agreement that was not barred by merger clause contained in the contract, and the seller accepted the benefit of such performance, summary judgment to the seller was erroneous; moreover, given that jury questions as to part performance of the oral agreement remained, order denying the buyer's partial summary judgment motion was upheld. *Hernandez v. Carnes*, 290 Ga. App. 730, 659 S.E.2d 925 (2008).

Third party beneficiary.

In a breach of contract action filed by an employee, who was a third-party beneficiary to an employment contract with a contractor, the trial court erred in granting the employee summary judgment as: (1) under the plain language of the employment agreement at issue between the parties, as well as the county's personnel policy, the contractor was authorized to terminate the employee based on the employee's inability or unfitness to perform the assigned duties due to an injury; and (2) the employee could not perform all the

job's requirements. *Am. Water Serv. USA v. McRae*, 286 Ga. App. 762, 650 S.E.2d 304 (2007), cert. denied, 2007 Ga. LEXIS 761 (Ga. 2007).

Because a valid general release entered into by a home buyer and home builder effectuated a binding accord and satisfaction barring any future claims between the parties, and absent evidence to void the release based on fraud, the buyer's filed claims in a subsequent suit filed against the home builder were properly summarily dismissed; thus, assessment of attorney fees was not an abuse of discretion and a penalty for filing a frivolous appeal was ordered. *Pacheco v. Charles Crews Custom Homes, Inc.*, 289 Ga. App. 773, 658 S.E.2d 396 (2008).

Employment contracts.

In an employee's suit arising out of the termination of an employment contract, the trial court properly granted the employer's motion for summary judgment, as: (1) as an at-will employee, the employee could be terminated without cause at any time; (2) the employer was authorized to protect its interest in its curriculum and property; (3) no evidence supported a claim of slander; and (4) vague statements accusing the employee of a crime did not constitute slander per se. *Taylor v. Calvary Baptist Temple*, 279 Ga. App. 71, 630 S.E.2d 604 (2006).

Upon a de novo review of the plain terms outlined in an employment contract, a former employer was not entitled to receive commission payments from its former employee, a licensed sales agent, for deals closed with the employee's subsequent employer, as any contrary reading would result in an unenforceable contract, under O.C.G.A. § 43-40-19(c); hence, summary judgment was properly granted to the employee on that issue, and the former employer's claim for money had and received also failed. *Richard Bowers & Co. v. Creel*, 280 Ga. App. 199, 633 S.E.2d 555 (2006).

In an action regarding an alleged breach of an employment contract seeking commissions on deals made by a real estate agent that a former real estate broker alleged it was entitled to, the trial court erred in entering summary judgment against the agent, finding that the

agent owed the broker commissions as to one of two contested deals, because: (1) the agent closed the deal with that client after terminating employment with the broker; and (2) it was undisputed that the agent had not agreed to share commissions with the broker on deals struck after the agent left the broker's employ. Thus, since summary judgment was properly entered in the agent's favor regarding commissions paid to the agent as to the second of the two contested clients, the broker was not entitled to litigation costs under O.C.G.A. § 13-6-11. *Morgan v. Richard Bowers & Co.*, 280 Ga. App. 533, 634 S.E.2d 415 (2006).

Trial court did not err in denying an employer's summary judgment motion, determining that the employee had performed the services necessary to be entitled to the allegedly agreed-upon per diem compensation; hence, the employee's status as an at-will employee was not determinative, and did not bar the cause of action. *Walker Elec. Co. v. Byrd*, 281 Ga. App. 190, 635 S.E.2d 819 (2006).

Trial court did not err in granting an employer's motion for summary judgment: (1) denying the employee's request for mandamus relief, given that the employee had no clear legal right to a job reinstatement, and based on a federal conviction, said claim was moot; and (2) denying the employer's quantum meruit claim, as the existence of an employment contract, under which the employee sought the same compensation as a quantum meruit claim, precluded any quantum meruit recovery. *Williams v. City of Atlanta*, 281 Ga. 478, 640 S.E.2d 35 (2007).

In a renewal action resulting from the termination of a commission agreement in favor of a payee, because the payee's quantum meruit and reformation claims were barred by res judicata, and the fact that the state court potentially lacked jurisdiction over the reformation claim was immaterial, the trial court erred in denying the payor's motion for summary judgment. *ChoicePoint Servs. v. Hiers*, 284 Ga. App. 640, 644 S.E.2d 456 (2007), cert. denied, 2007 Ga. LEXIS 499 (Ga. 2007).

In an action arising from an alleged employment contract between the parties,

the trial court erred in granting summary judgment to an employer as genuine issues of material fact remained regarding whether a contract indeed existed between the parties, which the employee actually signed and acknowledged. *Shilling v. Cornerstone Med. Assocs., LLC*, 290 Ga. App. 169, 659 S.E.2d 416 (2008).

In a breach of contract action centering around a contract of employment with a county employer and the county's board of tax assessors, because the employment contract was never approved by the county commission, and the county's payment of a salary to the employee was not considered a ratification of the contract in its entirety, the employee possessed only an at-will employment. Thus, summary judgment was properly entered against the employee. *Powell v. Wheeler County*, 290 Ga. App. 508, 659 S.E.2d 893 (2008).

Res judicata. — The appeals court agreed with the trial court that the doctrine of res judicata barred the negligence and breach of contract claims asserted by two property owners against a contractor, as: (1) the claims were essentially identical to the allegations in a counterclaim filed in a prior Cherokee County action; (2) the parties in the two cases were identical for purposes of res judicata; and (3) the Cherokee County suit resulted in an adjudication on the merits. *Perrett v. Sumner*, 286 Ga. App. 379, 649 S.E.2d 545 (2007).

Landowner's trespass and nuisance suit. — In two cases involving a dispute for nuisance and trespass arising out of excessive water runoff which flowed onto a landowner's land, the trial court's grant of summary judgment to a construction contractor as to the issue of its liability was reversed, while the denial of summary judgment to a developer as to the issue of its liability was affirmed, as: (1) the combination of the lay and expert testimony as to the presence of the excess runoff and its cause presented questions of fact for a jury to decide; (2) merely because the county approved the development activities did not mean that either the contractor or the developer or both could not be held liable for nuisance; and (3) the landowner's action against the alleged creators of the water-runoff nui-

sance was authorized, regardless of their having sold the property. *Green v. Eastland Homes, Inc.*, 284 Ga. App. 643, 644 S.E.2d 479 (2007), cert. denied, 2007 Ga. LEXIS 629 (Ga. 2007).

Premises liability to invitee. — In a premise liability action, because questions of fact remained as to whether a student was a university's invitee at the time the student was shot on what was alleged to be the university's property at the time of the assault, and thus, whether the university owed the student a duty of ordinary care, and no evidence was presented that the student lost an "invitee" status, summary judgment in the university's favor was reversed. *Clark Atlanta Univ., Inc. v. Williams*, 288 Ga. App. 180, 654 S.E.2d 402 (2007), cert. denied, 2008 Ga. LEXIS 227 (Ga. 2008).

In a premises liability action filed by a guest of a property owner, because the guest failed to show that the owner had any actual or constructive knowledge of the alleged hazard that allegedly caused the guest's injuries, specifically, a hole in an otherwise flat, grassy area of the owner's yard, the court properly granted the owner summary judgment. *Thomas v. Deason*, 289 Ga. App. 753, 658 S.E.2d 165 (2008).

Restrictive covenants. — On appeal from an order in a declaratory judgment action, the trial court did not err in finding, upon cross-motions for summary judgment, that restrictive covenants which had been made applicable to the subdivision over 20 years earlier remained in effect and prohibited a buyer from re-subdividing certain tracts into residential lots with less than five acres, but did err in ruling that interpretation of the covenants was a legal matter for the court, rather than a factual matter for the jury. *Britt v. Albright*, 282 Ga. App. 206, 638 S.E.2d 372 (2006), cert. denied, 2007 Ga. LEXIS 199 (Ga. 2007).

Defamation actions.

Trial court erroneously granted summary judgment against an election candidate, and in favor of the incumbent, on the former's defamation claims stemming a printed newspaper advertisement, as issues of fact remained as to the actual malice exhibited by the incumbent in pub-

lishing the advertisement, and the flagrant accusations stated therein went beyond the criticism, hostility and unfairness a candidate might expect to encounter while running for political office. *Howard v. Pope*, 282 Ga. App. 137, 637 S.E.2d 854 (2006).

In an action by a contractor against a newspaper and the newspaper's editor, because: (1) the average reader would have interpreted a printed headline's use of the term "rape" as an attempt to convey the severity of the damage to the land that the contractor inflicted rather than to characterize the contractor's conduct that resulted in the damage as criminal; and (2) the article referred to by the headline did not constitute libel per se as the editor unquestionably did not intend, and readers did not interpret, the word "rape" as having any sexual connotation in the context used in the article, the editor and the newspaper were properly granted summary judgment as to the contractor's libel and libel per se claims. *Lucas v. Cranshaw*, 289 Ga. App. 510, 659 S.E.2d 612 (2008).

Application of voluntary payment doctrine. — The voluntary payment doctrine did not bar a city's unjust enrichment and conversion claims filed against a construction contractor, as the contractor failed to show that a genuine issue of material fact remained over whether the city was negligent in ascertaining the true facts and any prejudice if the duplicate payment were returned to the city. *D & H Constr. Co. v. City of Woodstock*, 284 Ga. App. 314, 643 S.E.2d 826 (2007).

Fraud.

In an action between a home builder and its buyers, the trial court did not err in granting summary judgment on the buyers' fraud claim, as: (1) the terms of the construction contract explicitly acknowledged that the construction price was based on allowances set in the budget and would change if actual costs exceeded the original allowance amount; (2) the buyers both acknowledged that they understood that the original contract price was not a fixed price, and that they would be responsible for actual costs that exceeded the allowances contained in the contract; (3) the buyers admitted that a

portion of the additional costs resulted from changes that they had requested; and (4) as a result, the mere existence of the change orders did not indicate that the builder fraudulently induced the buyers to enter into the contract. *Davis v. Whitford Props.*, 282 Ga. App. 143, 637 S.E.2d 849 (2006).

Trial court did not err in granting a car dealer summary judgment against a customer's fraud claim, as: (1) the customer's contention that the dealer knew of the alleged defects in a car sold to the customer at the time of the sale was specifically negated by affidavits submitted by the dealer's service and maintenance employees; and (2) even if the dealer knew of the car's defectiveness after the sale, this knowledge did not amount to either knowledge, or a reckless disregard of the car's defectiveness, at the time of the sale; hence, as a result, the trial court did not err in granting the dealer's motion for summary judgment on the customer's claims for attorney fees under O.C.G.A. § 13-6-11, costs, and punitive damages pursuant to O.C.G.A. § 51-12-5.1. *Morris v. Pugmire Lincoln Mercury, Inc.*, 283 Ga. App. 238, 641 S.E.2d 222 (2007).

Stockholders' declaratory judgment action. — Because no evidence was presented that the shares in the administratively dissolved company which the stockholders originally purchased, and which pre-dated the corporation's formation, were ever transformed into the corporation's stock, and the stockholders' fraud claims were vague at best, the corporation was properly granted summary judgment in the stockholders' declaratory judgment action seeking a declaration that they owned stock in the corporation based on their purchase of stock in the administratively dissolved company. *Wright v. AFLAC, Inc.*, 283 Ga. App. 890, 643 S.E.2d 233 (2007).

Insurance contracts.

Upon an insurer's interlocutory appeal, the appeals court found that the insurer was properly denied summary judgment on an insured's individual and class action claims for unearned insurance premiums owed under credit life and disability policies, as the insured satisfied any contractual notice requirements to filing suit, the

class was properly certified, and the insured adequately represented the interests of the class. *J.M.I.C. Life Ins. Co. v. Toole*, 280 Ga. App. 372, 634 S.E.2d 123 (2006).

In an action between an insurer and its insured regarding the insured's claim for additional coverage, because the provisions regarding blanket liability and additional limits of liability were ambiguous, and application of O.C.G.A. § 13-2-2 was insufficient to eliminate the ambiguity in that it was impossible to ascertain how much coverage was provided for the items at issue, particularly soft cost, a jury was to consider the circumstances surrounding the transaction to determine the scope and effect of the policy; hence, the insured was erroneously granted partial summary judgment on the issue. *RLI Ins. Co. v. Highlands on Ponce, LLC*, 280 Ga. App. 798, 635 S.E.2d 168 (2006).

Trial court's grant of summary judgment upheld on appeal, in an insurance applicant's negligent misrepresentation action filed against an agency and its agent, as the applicant failed to include the insurance application, that was the focus of the suit, in the appellate record. *Hattaway v. Conner*, 281 Ga. App. 20, 635 S.E.2d 330 (2006).

In an action filed against an insurer seeking coverage under a homeowners policy, the insureds were properly denied coverage for damages to a home they did not live in, and the insurer was properly granted summary judgment on the issue of coverage, as the policy at issue clearly stated that the "insured premises" meant the residence the insureds used as their primary residence. *Varsalona v. Auto-Owners Ins. Co.*, 281 Ga. App. 644, 637 S.E.2d 64 (2006).

In an action concerning the limits of uninsured motorist (UM) coverage available under a claimant's policy, which was held with the claimant's husband who was the named insured thereunder, their insurer was properly granted summary judgment on said issue, as the 2001 amendment to O.C.G.A. § 33-7-11 had no effect on the limits of UM coverage under the policy covering the claimant's vehicle, and as such, the insurer was not required to notify the claimant of the change in the

law or to secure a separate UM election at the time this vehicle was added to the original insurance policy. *Soufi v. Haygood*, 282 Ga. App. 593, 639 S.E.2d 395 (2006).

The trial court erred in denying an insurer's motion for summary judgment as to the issue of coverage, as an assault and battery exclusion contained in its commercial general liability policy barred coverage to its insured for damages claims arising from a shooting on the insured's premises in a wrongful death action filed against the insured; moreover, inclusion of the phrase "whether or not" in the exclusion was significant and made clear that the exclusion was intended to apply to all instances of assault and battery occurring on the premises. *First Specialty Ins. Corp. v. Flowers*, 284 Ga. App. 543, 644 S.E.2d 453 (2007).

The trial court did not err in granting an insurer summary judgment, in its declaratory judgment action, finding that it owed no duty to its insured to defend or indemnify the insured in an action filed by the insured's client who was injured in an accident involving the covered vehicle, as the policy at issue showed no liability coverage, and hence, did not obligate the insurer to said duty. *Simalton v. AIU Ins. Co.*, 284 Ga. App. 152, 643 S.E.2d 553 (2007).

In a breach of contract action filed by an insured against its insurer, the trial court did not err in granting the insurer summary judgment as to the issue of coverage, as questions answered untruthfully in the application for insurance by the insured amounted to misrepresentations warranting a cancellation of the policy at issue, pursuant to O.C.G.A. § 33-24-7. *T. J. Blake Trucking, Inc. v. Alea London, Ltd.*, 284 Ga. App. 384, 643 S.E.2d 762 (2007), cert. denied, 2007 Ga. LEXIS 505 (Ga. 2007).

Because Georgia contract law stated that the statute of limitation on a contract which contemplated an actual demand began to run 30 days after notice was sent of the amount due, as contemplated by the contract between an insured and its insured, the trial court erred in finding that the insurer's claim for reimbursement from the insured was time-barred; thus,

summary judgment in favor of the insured was inappropriate. *Canal Ins. Co. v. Pro Search*, 286 Ga. App. 164, 648 S.E.2d 497 (2007), cert. denied, 2007 Ga. LEXIS 870 (Ga. 2007).

The trial court properly granted summary judgment to an insured in its insurer's declaratory judgment action, requiring the insurer to defend and indemnify the insured in the underlying suit filed by a resident of the insured's personal care home arising from an attack by a fellow resident, as the incident occurred without the insured's foresight, expectation, or design, and was thus properly characterized as accidental under the terms of the insured's policy. *Cincinnati Ins. Co. v. Magnolia Estates, Inc.*, 286 Ga. App. 183, 648 S.E.2d 498 (2007), cert. denied, 2008 Ga. LEXIS 88 (Ga. 2008).

Due to the inadequacies of an insured's bad faith demand, as its attempt to equate the submission of a claim with the demand for payment required by O.C.G.A. § 33-4-6 was directly contravened by case law, and the fact that the insurer met all its obligations under the policy the insurer issued to its insured, the trial court did not err in denying summary judgment to the insured and granting summary judgment on the insurer's cross-motion, authorizing the insurer to quitclaim the refinanced property to the insurer in full satisfaction of its duties and obligations under the policy. *BayRock Mortg. Corp. v. Chi. Title Ins. Co.*, 286 Ga. App. 18, 648 S.E.2d 433 (2007), cert. denied, 2008 Ga. LEXIS 108 (Ga. 2008).

Because the damages a tenant sought under a commercial general liability policy issued to the insured-landlord for carbon monoxide poisoning were clearly excluded by the unambiguous terms contained within an exclusion under the policy, the trial court erred in denying the insurer's motion for summary judgment as to the issue of coverage. *Auto-Owners Ins. Co. v. Reed*, 286 Ga. App. 603, 649 S.E.2d 843 (2007), aff'd, 286 Ga. 667 S.E.2d 90 (2008).

Given that the language in an insurance contract providing for catastrophic coverage only extended to inpatient, and not outpatient, services, the trial court properly granted summary judgment as to

the issue of the insurer's coverage, as the hospital bill for which the insured sought payment was for outpatient services. *Michna v. Blue Cross & Blue Shield of Ga., Inc.*, 288 Ga. App. 112, 653 S.E.2d 377 (2007), cert. denied, 2008 Ga. LEXIS 214 (Ga. 2008).

Under the ordinary rules of contract construction, because: (1) no ambiguity in an insurance contract existed; and (2) the insurer was authorized to reduce the uninsured motorist policy limits therein per the directions of the insured, no error resulted from the trial court's order granting summary judgment to an insurer as to the issue of coverage. Moreover, separate signatures rejecting bodily injury coverage and property damage coverage were not required, and the court did not rely upon affidavits containing inadmissible evidence. *Lambert v. Alfa Gen. Ins. Corp.*, 291 Ga. App. 57, 660 S.E.2d 889 (2008).

Insurance settlement.

In an action claiming beneficiary status to two annuities issued to a decedent, the trial court properly granted summary judgment to a foundation, and against an individual, on grounds that the decedent failed to do all that was necessary to change the beneficiary of the decedent's annuities to the individual, as such was specifically required for the change of beneficiary designation to go into effect, and substantial compliance with the requirements was insufficient; hence, no material fact issues remained. *Lake v. Young Harris Alumni Found., Inc.*, 283 Ga. App. 409, 641 S.E.2d 628 (2007).

Uninsured motorist coverage.

Because Georgia public policy prohibited an exclusion within an insurer's uninsured coverage for the use of any motor vehicle by an insured to carry persons or property for a fee, as such denied the statutorily mandated coverage to an otherwise qualified insured, and the requirements under O.C.G.A. § 33-7-11 were plain and not illogical, summary judgment in favor of the insurer on this issue was reversed. *Wagner v. Nationwide Mut. Fire Ins. Co.*, 288 Ga. App. 132, 653 S.E.2d 526 (2007).

Insurer coverage.

In a mother's suit claiming that an insurer breached its insurance contract

with the son by failing to defend the son in the mother's suit brought against the son arising out of a car accident occurring when the son was driving the mother's car, summary judgment was properly granted on the issue of insurance coverage under the policy, which obligated the insurer to pay damages for which the insured was legally liable because of damages arising out of an accident involving the insured car or a car which was not owned by a resident of the insured's household, because, while the mother and the son lived in the same house, this was not determinative of the question of whether the mother was a resident of the son's household. The mother's proof showed that she and her son maintained distinct households under different management, in that they each were responsible for separate parts of the house, did not cook or clean for each other, and came and went independently; and the insurer offered no evidence to counter the mother's proof. *Southern Gen. Ins. Co. v. Foy*, 279 Ga. App. 385, 631 S.E.2d 419 (2006).

Because the trial court erred in construing an insurer's policy to its insured, and a fact question remained as to an issue of slander, summary judgment was inappropriately entered; but, the insurer was not required to provide specific, unambiguous reasons for denying coverage in its reservation of rights letter to the insured. *Southern Gen. Ins. Co. v. Foy*, 279 Ga. App. 385, 631 S.E.2d 419 (2006).

Because: (1) resolution of the issues raised in a petition filed by the Georgia Insurers Insolvency Pool were dependent upon a determination by the State Board of Workers' Compensation of the amount, if any, an injured employee was entitled to recover in the pending, unresolved claim for workers' compensation; and (2) after a notice to controvert was filed, the Board never held a hearing or issued any findings with regard to liability for the claim, the trial court lacked subject matter jurisdiction to determine the applicability of earlier provisions of O.C.G.A. § 33-36-14(a) to the Pool's claim against an insurer, after another carrier became insolvent, and hence, grant the Pool summary judgment in its declaratory judgment action. *Royal Indem. Co. v. Ga. In-*

surers Insolvency Pool, 284 Ga. App. 787, 644 S.E.2d 279 (2007), cert. denied, 2007 Ga. LEXIS 639 (Ga. 2007).

Intent.

In an action for conversion of the an estate's assets relating to a joint account created under O.C.G.A. § 7-1-813 between the executrix and a half-sister, given that some evidence existed that the decedent's purpose in establishing a joint account between the executrix of decedent's estate and the half-sister was for the decedent's convenience, and not to effect a gift, summary judgment was erroneously granted to the half-sister. *Gray v. Benton*, 280 Ga. App. 339, 634 S.E.2d 86 (2006).

In a declaratory judgment action between a settlor's offspring regarding an agreement signed by the settlor to reform a trust, the trial court properly granted summary judgment to one sibling over the other, upholding the agreement as validly reforming the trust in order to fully effectuate the settlor's intent that the offspring divide the remainder of a trust's proceeds equally between them, per stirpes; moreover, the trial court correctly ruled that the prevailing sibling could not rely on the defenses of laches and unclean hands, as such were equitable doctrines not applicable in a declaratory judgment action. *Briden v. Clement*, 283 Ga. App. 626, 642 S.E.2d 318 (2007).

Medical malpractice.

In a negligence action filed by a decedent's administrator, summary judgment was properly granted to a doctor and a clinic for the post-op treatment of the decedent, as: (1) both the doctor and the clinic remained immune from suit under O.C.G.A. § 51-1-29.1; (2) the doctor's treatment of the decedent's complications immediately following the decedent's surgery did not change the voluntary nature of the treatment as a whole; (3) it was reasonable to expect that a physician would continue to treat a patient following surgery; and (4) the appeals court viewed the doctor's voluntary treatment of the decedent as a whole, not divided into categories of preoperative, operative, and post-operative; moreover, because no evidence was presented that either the doctor or the clinic was a "charitable institu-

tion," and O.C.G.A. § 51-1-29.1 provided no such exception, waiver of any common-law charitable immunity through the doctor's procurement of liability insurance did not apply. *Wells v. Rogers*, 281 Ga. App. 473, 636 S.E.2d 171 (2006), cert. denied, 2007 Ga. LEXIS 101 (Ga. 2007).

Because a catheter intentionally placed in a patient's body was not a "foreign object" as contemplated by O.C.G.A. § 9-3-72, and the fact that it might have been negligently placed did not alter this finding, absent evidence of a doctor's fraud or concealment of the same, summary judgment in a patient's medical malpractice suit was properly granted to a doctor and a clinic, as the applicable two-year statute of limitation had expired by the time the action was filed. *Pogue v. Goodman*, 282 Ga. App. 385, 638 S.E.2d 824 (2006).

Trial court erred in denying partial summary judgment on a patient's medical malpractice and ordinary negligence claims, when, given evidence that the patient suffered an injury arising out of the misdiagnosis in January of 1999, when the patient was first seen by the doctor manifesting continuous symptoms of a moderate B-12 deficiency and the doctor failed to make the diagnosis and provide treatment, and the patient failed to file an action within the two years; but, because the patient's ordinary negligence and breach of fiduciary duty claims were essentially malpractice claims, subject to the same limitations period, summary judgment as to these claims was upheld. *Stafford-Fox v. Jenkins*, 282 Ga. App. 667, 639 S.E.2d 610 (2006).

On appeal from the grant of summary judgment in favor of a dentist in a patient's medical malpractice action, such was upheld based on the expiration of the statute of limitation and rejection of the continuous treatment doctrine by the Supreme Court of Georgia and because the exception for a subsequent injury did not apply. *Bousset v. Walker*, 285 Ga. App. 102, 645 S.E.2d 593 (2007).

In a medical malpractice action, because the record on appeal contained evidence creating a genuine issue of material fact as to the proximate cause of a pa-

tient's injuries, the trial court erred in granting a hospital summary judgment; moreover, the appeals court declined to hear the hospital's claim that the patient failed to comply with O.C.G.A. § 9-11-9.1. *Renz v. Northside Hosp., Inc.*, 285 Ga. App. 882, 648 S.E.2d 186 (2007).

The trial court erred in granting a medical clinic's motion for summary judgment in a patient's medical malpractice action and in finding that an affidavit provided by a patient's expert did not sufficiently establish causation, as the expert specifically explained the precautions that should have been taken by the employee administering a shot to the patient, and stated that the failure to take these precautions proximately caused the patient's injury; moreover, given the expert's past relevant experience as a nurse, the expert was competent to provide an opinion in the case. *Allen v. Family Med. Ctr., P.C.*, 287 Ga. App. 522, 652 S.E.2d 173 (2007).

Because a medical care provider failed to assert an available defense in the underlying action which would have absolved it from any liability and prevented a default judgment from entering against it, the trial court did not err in entering summary judgment against it on its claims for contribution and indemnity. *Emergency Professionals of Atlanta, P.C. v. Watson*, 288 Ga. App. 473, 654 S.E.2d 434 (2007), cert. denied, 2008 Ga. LEXIS 407 (Ga. 2008).

In a medical malpractice action, because the undisputed evidence showed that both the personal injury claims and a later-added wrongful death claim were timely filed, both in terms of O.C.G.A. § 9-3-71 and the relevant statute of repose, the doctors sued were properly denied summary judgment as to those claims. *Cleaveland v. Gannon*, 288 Ga. App. 875, 655 S.E.2d 662 (2007), aff'd, 284 Ga. 376, 667 S.E.2d 366 (2008).

In a couple's medical malpractice action, because: (1) the couple failed to follow the court's case management orders, which the couple selected and consented to; (2) the couple's only expert was properly excluded as a rebuttal witness; and (3) the couple failed to present any evidence of causation, the trial court properly entered summary judgment against the

couple. *Thomas v. Peachtree Orthopaedic Clinic, P.C.*, 290 Ga. App. 869, 660 S.E.2d 758 (2008), cert. denied, 2008 Ga. LEXIS 915 (Ga. 2008).

In a medical malpractice action, because the suing couple's failure to faithfully engage in discovery could not be remedied by the exclusion of probative trial evidence, specifically, the testimony from the couple's expert witness, the trial court erred in entering summary judgment against the couple. *Hart v. Northside Hosp., Inc.*, 291 Ga. App. 208, 661 S.E.2d 576 (2008).

Negligent credentialing. — Surviving spouse's negligent credentialing suit against a hospital was properly dismissed on summary judgment as the undisputed evidence showed that the surgeon did not perform the prostatic cryosurgery negligently. The surviving spouse's own expert witness affirmatively stated that the rectal injury, which caused the deceased spouse's death, was not the result of the surgeon's negligence during the cryosurgery but was a complication that could have occurred during any prostate cancer surgery and in the absence of any negligence, and that the surgeon's negligence did not occur until five weeks later, during the surgeon's treatment of the deceased spouse following an emergency hospitalization. *Ladner v. Northside Hosp., Inc.*, 314 Ga. App. 136, 723 S.E.2d 450 (2012).

Legal malpractice.

In a legal malpractice action, because the attorneys' failure to exercise due diligence in procuring service of process constituted professional negligence, resulting in a loss of their clients' rights to pursue a claim against their own UM carrier, and conflicting evidence was presented as to the issue of whether the clients' rights under O.C.G.A. § 9-2-61 to pursue a claim against their own uninsured motorist insurance carrier were impeded by their attorneys' actions, summary judgment was reversed. *Butler v. Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, P.L.*, 280 Ga. App. 207, 633 S.E.2d 614 (2006).

While an attorney was shielded from liability as to the issue of whether a breach occurred as to the duty of care

owed to the clients by failing to verify the complaint pursuant to O.C.G.A. § 9-11-11.1(b), opting instead to dismiss the complaint and refile it as a renewal action, summary judgment as to the issues of harm to the clients and a breach of the duty of ordinary care as a result of the attorney's failure to advise was reversed. *Chatham Orthopaedic Surgery Ctr., LLC v. White*, 283 Ga. App. 10, 640 S.E.2d 633 (2006).

Despite an attorney's claim that privity of contract with a decedent's widow was lacking, because the evidence supported a finding that the widow was an intended beneficiary of the decedent's will, the attorney owed the widow a similar duty to the one owed to the decedent, as the attorney's client, resulting in the attorney's liability upon a breach of that duty, making partial summary judgment in the widow's favor proper. *Young v. Williams*, 285 Ga. App. 208, 645 S.E.2d 624 (2007).

In a legal malpractice action, despite the fact that the trial court held that the client's failure to prove proximate causation supported an order granting summary judgment to the attorney and that attorney's law firm, the appeals court nevertheless held that summary judgment was properly granted to said attorney, under the "right for any reason" rule, as the suit was untimely filed. Moreover, the client's argument that the attorney could have amended the suit to add a damages claim up until the time of a pre-trial order, and that this later failure to act should be considered the triggering date for the malpractice action, was unavailing, as the attorney's failure to amend constituted a failure to avoid the effect of the earlier breach and a failure to mitigate damages, but was not a failure inflicting a new harm, thus triggering a new limitations period. *Duke Galish, LLC v. Arnall Golden Gregory, LLP*, 288 Ga. App. 75, 653 S.E.2d 791 (2007), cert. denied, 2008 Ga. LEXIS 212 (Ga. 2008).

Negligence.

Trial court properly denied a driver's summary judgment motion, in a police officer's personal injury action against the driver, as the officer's suit was not barred by the Fireman's Rule, given that the alleged negligence that occurred to cause

the accident which injured the officer had nothing to do with the officer's presence at the scene. *Davis v. Pinson*, 279 Ga. App. 606, 631 S.E.2d 805 (2006).

Conclusion of the expert's testimony as to the cause of an auto accident was speculative and could not support summary judgment, as the credibility of the expert and the weight to be given to the opinion were matters to be addressed by the jury; moreover, if the expert's opinion was based upon inadequate knowledge, this fact did not mandate the exclusion of the opinion but, rather, presented a jury question as to the weight which should be assigned to it. *Layfield v. DOT*, 280 Ga. 848, 632 S.E.2d 135 (2006).

Trial court properly granted summary judgment against an employee, in a third-party action against two contractors and a consultant, because: (1) the employee failed to present sufficient evidence that the alleged negligence by these third parties caused excessive clogging of the conveyor as the employee was injured and forced the employer to operate a conveyor without its cover; and (2) even if the employee established a factual issue as to whether these third parties were negligent in failing to install an emergency pull-cord on the conveyor or in failing to put a second light switch in the tunnel, the employee was still required to show that such was a proximate cause of the injury, which the employee failed to do; moreover, none of the third parties could have reasonably anticipated or foreseen that the employer would negligently seal off the access where the tunnel light switch was located and disregard the manufacturer's warnings and OSHA regulations by running the conveyor with a section of the cover removed. *Cieplinski v. Caldwell Elec. Contrs., Inc.*, 280 Ga. App. 267, 633 S.E.2d 646 (2006).

While the trial court erred in granting summary judgment against a patient in a medical malpractice action based on a failure to attach an expert affidavit pursuant to O.C.G.A. § 9-11-9.1 because the complaint could be construed as alleging claims of ordinary negligence, to the extent the complaint could be read to allege professional malpractice claims, summary judgment was proper; moreover, there

were instances in which actions performed by a professional were nevertheless not professional acts constituting professional malpractice, but, rather, were acts of simple negligence which would not require proof by expert evidence. *Brown v. Tift County Hosp. Auth.*, 280 Ga. App. 847, 635 S.E.2d 184 (2006).

In a negligence action stemming from an auto accident between a driver and a farmer's cow, the trial court properly granted summary judgment on the driver's claim for consequential damages, which was sought for a "ruined vacation," as the driver failed to show any evidence of a physical injury which was a necessary element on a claim premised on ordinary negligence. *Hoeflick v. Bradley*, 282 Ga. App. 123, 637 S.E.2d 832 (2006).

In a negligence action, summary judgment entered against a driver on a property damages claim was reversed, based on the collateral source rule, defendant farmer's failure to prove the existence of a subrogation agreement, and the issue of the farmer's liability to the driver, if any, was a jury question. *Hoeflick v. Bradley*, 282 Ga. App. 123, 637 S.E.2d 832 (2006).

Because alternative grounds in a negligence action arising out of the construction and resurfacing of a road, specifically, whether competent evidence showed that there were any defects in the roadway and whether the Department of Transportation's acceptance of the paving project exonerated the contractor, presented questions of fact for a jury to decide, the Supreme Court of Georgia's reversal of an order granting summary judgment to the Department and the contractor was adopted. *Layfield v. DOT*, 283 Ga. App. 151, 640 S.E.2d 618 (2006).

The trial court's summary judgment order in a negligence suit was properly entered against a couple, and in favor of a parent, as: (1) the family purpose doctrine did not apply to the couple's lawsuit; (2) the parent's child was not a member of the parent's household; and (3) upon a review of the record, after the parent came forward with sufficient evidence to support the motion, the couple as the non-moving party failed to come forward with evidence in opposition to the motion. *Hicks v. Newman*, 283 Ga. App. 352, 641 S.E.2d 589 (2007).

Because any duty a construction site owner and various contractors had to warn a construction worker of the buried electrical lines was satisfied by notice to that worker's supervisor, who admitted to notice and knowledge of the buried lines, the trial court properly entered summary judgment against the worker in a negligence action filed against them, as no other duties existed; moreover, the worker's denial as to being informed by the supervisor of the existence and location of the buried lines in the area worked on was neither relevant nor material to the issue of any duty owed to the worker, and was not a genuine issue of material fact that would have precluded summary judgment. *McKinney v. Regents of the Univ. Sys. of Ga.*, 284 Ga. App. 250, 643 S.E.2d 736 (2007), cert. denied, 2007 Ga. LEXIS 497 (Ga. 2007).

In a lessee's negligence action against a lessor, because questions of fact remained regarding the lessor's breach of a duty owed to the lessee in reporting the recovery of a previously stolen rental trailer, and as to whether a breach of said duty proximately caused the lessee to become arrested for being in possession of stolen property and remained detained for a lengthy period of time, those issues could not be resolved as a matter of law; thus, an order granting the lessor summary judgment had to be reversed. *Halilovic v. Penske Truck Leasing*, 287 Ga. App. 215, 651 S.E.2d 160 (2007).

Because the undisputed facts presented before the trial court showed that the insurer of the leased premises owed no duty to those who leased the same, and did not undertake any duty itself or through its claims adjuster, the trial court erred in denying the insurer's summary judgment motion on the lessees' negligence claim filed against it. *GuideOne Mut. Ins. Co. v. Hunter*, 286 Ga. App. 852, 650 S.E.2d 424 (2007).

Because a litigant could not utilize a theory known as "outsider reverse veil-piercing" to support a claim of negligence against a superior court clerk to satisfy a judgment owed to that litigant by a third party, and because the litigant failed to present any other viable proximate cause argument, the clerk was enti-

tled to complete summary judgment as to the issue. *Lollis v. Turner*, 288 Ga. App. 419, 654 S.E.2d 229 (2007).

In a negligence action between an injured bus passenger and a bus company, because the passenger failed to present evidence regarding the cause of the injuries the passenger sustained while walking in a field after disembarking from the bus after the bus had pulled over, and because the cause remained a matter of pure speculation or conjecture, the trial court had a duty to grant summary judgment to the bus company. *Greyhound Lines, Inc. v. Williams*, 290 Ga. App. 450, 659 S.E.2d 867 (2008).

In a personal injury action arising from a child's injuries as a pedestrian, because conflicting testimony was presented to the trial court as to the issue of a driver's negligence as well as a parent's comparative negligence and apportionment of fault, if any, the trial court properly denied the driver's motion for summary judgment. *Sutton v. Justiss*, 290 Ga. App. 565, 659 S.E.2d 903 (2008).

In civil action for damages caused by felling of a tree under doctrine of respondeat superior, trial court erroneously denied homeowner's motion for summary judgment as an independent contractor was hired to fell the tree and homeowner had no control over contractor's actions, and act of felling tree was not wrongful in itself; moreover, homeowner's single suggestion or comment that contractor could proceed with felling the tree as an entire unit did not necessarily have to be followed and did not create liability on homeowner's part, but was simply confirming freedom of contractor to fell the tree as that contractor deemed appropriate. *Whately v. Sharma*, 291 Ga. App. 228, 661 S.E.2d 590 (2008).

Good Samaritan law and negligence action. — In a negligence action filed by the parents on behalf of their injured son, because jury questions remained as to whether a doctor had to provide immediate "emergency care at the scene of an accident or emergency" to the son within the meaning of the Good Samaritan statute, O.C.G.A. § 51-1-29, as well as the employer-hospital's immunity from any vicarious liability, summary

judgment was erroneously entered against the parents and in favor of both the doctor and the hospital. *Gilley v. Hudson*, 283 Ga. App. 878, 642 S.E.2d 898 (2007).

When premises owner was deemed to have superior knowledge of the hazard that was alleged to have caused the slip and fall, based on the testimony of the injured patron's daughter that the owner had actual knowledge of the hazard, summary judgment in the owner's favor was unauthorized, and the appeals court erred in finding otherwise. *Dickerson v. Guest Servs. Co.*, 282 Ga. 771, 653 S.E.2d 699 (2007).

Slip and fall by pedestrian in pothole. — Trial court erred in denying summary judgment to both a city and the Department of Transportation, in a slip and fall case filed against them by a pedestrian, as: (1) the pedestrian conceded that the pedestrian was a licensee with equal constructive knowledge of any hazard posed by potholes; (2) the pothole in which the pedestrian fell was not a concealed or camouflaged danger; and (3) no evidence was presented that the pothole was maintained wilfully or wantonly. *Ga. DOT v. Strickland*, 279 Ga. App. 753, 632 S.E.2d 416 (2006).

Liability for hunter's death who was licensee on property. — Premises owner and its operator were properly granted summary judgment in an action filed against them by a decedent's administrator, as the decedent, who was granted permission to hunt on the property without a permit, was not shown to be anything other than a licensee, no breach of any duty owed to the decedent as a licensee was presented, and an intervening illegal act by a third party was the proximate cause of the decedent's death; moreover, because the evidence showed that there had never been an accidental shooting of one hunter by another on the premises, no basis existed for holding that the owners or operator should have foreseen that a third party would come onto the property and illegally shoot at a target which the third party could not identify. *Hadden v. ARE Props., LLC*, 280 Ga. App. 314, 633 S.E.2d 667 (2006).

Normal household items causing fall by licensee in home. — In a licens-

ee's personal injury action, the trial court properly found that a homeowner was entitled to summary judgment as a matter of law, as the homeowner owed no duty to the licensee to warn of the obviousness of a broom handle, tools on the floor, or the couch corner, which the licensee alleged caused a fall, as such were plainly visible and not hidden perils. *Ellis v. Hadnott*, 282 Ga. App. 584, 639 S.E.2d 559 (2006).

Premises liability to lessee. — In a wrongful death action filed by a decedent-lessee's administrator in which the decedent was killed when crossing a public highway that the lessor did not control, the lessor was properly granted summary judgment, as the administrator failed to show that the lessor was negligent per se or that the lessor breached either a common law or private duty owed to the lessee. *Walton v. UCC X, Inc.*, 282 Ga. App. 847, 640 S.E.2d 325 (2006).

Trial court properly granted summary judgment to the homeowners, in a personal injury action filed by a caretaker who worked in the home, as the caretaker's equal knowledge of the improper construction of the stairs in the home barred recovery, despite the fact that the construction violated the applicable building code; moreover, the caretaker's claim was not saved by an admission of contributory negligence. *Argo v. Chitwood*, 282 Ga. App. 156, 637 S.E.2d 865 (2006).

In a premises liability action arising from a slip and fall on ice by an injured lessee, because jury issues existed as to whether the party exercised the requisite care, and as to the premises owner's knowledge of the hazard, the trial court erred in granting summary judgment to the owner and an insurer and in reasoning that the lessee failed to exercise due care. *Little v. Alliance Fire Prot., Inc.*, 291 Ga. App. 116, 661 S.E.2d 173 (2008).

Enforcement of materialman's liens. — Because a notice under O.C.G.A. § 44-14-361.1(a)(3) was not filed within 14 days of a lien claimant's suit being initiated, the lien was unenforceable, and the trial court did not err in granting a developer's motion for partial summary judgment against the lien claimant; while the appeals court sympathized with the lien claimant's argument that the claim-

ant received a file-stamped copy and as a result believed no fee was due, ultimately it was the responsibility of plaintiff and plaintiff's counsel to see that the appropriate fees were paid in a timely manner. *Kendall Supply, Inc. v. Pearson Cmty., Inc.*, 285 Ga. App. 863, 648 S.E.2d 158 (2007).

Misappropriation of trade secrets. — Because: (1) the trial court erred in holding that mere suspicion of a possible misappropriation of an employer's trade secrets by one of its former employees amounted to objectively reasonable notice sufficient to trigger the running of the statute; and (2) a fact issue existed as to whether the suspicions reflected in the employer's letters to the former employee's counsel were sufficient to cause a reasonable person to investigate whether its trade secrets had been misappropriated, the trial court erred in granting the former employee partial summary judgment on the basis of the five-year statute of limitations under O.C.G.A. § 10-1-766. *Porex Corp. v. Haldopoulos*, 284 Ga. App. 510, 644 S.E.2d 349 (2007), cert. denied, 2007 Ga. LEXIS 498 (Ga. 2007).

Fair Credit Reporting Act. — Because the record evidence showed that a customer failed to file suit alleging claims under the Fair Credit Reporting Act within the two years after a wireless service provider reported the customer's outstanding debt to one credit agency, as required by 15 U.S.C. § 1681p, the suit was properly dismissed via summary judgment as time-barred. *Lamb v. Verizon Wireless Servs., LLC*, 284 Ga. App. 696, 644 S.E.2d 412 (2007).

General premises liability.

In a customer's premises liability action, because factual issues existed as to whether a retailer knew or should have known of a hazardous condition when it left a rolled-up carpet mat leaning on its end in the produce department, and whether the retailer could foresee that it would be knocked over and become a tripping hazard, summary judgment in favor of the retailer, and against the customer, was reversed. *Freeman v. Wal-Mart Stores, Inc.*, 281 Ga. App. 132, 635 S.E.2d 399 (2006).

In a wrongful death action against a

church as a premises owner, because the decedent's husband, as administrator of the estate, failed to raise a material fact question of the church's liability for allowing its parishioners to park on the side of the roadway, and thus, obstruct the decedent's view of the adjacent intersection, causing the decedent to collide with an oncoming northbound vehicle, the church was properly granted summary judgment. *Gay v. Redland Baptist Church*, 288 Ga. App. 28, 653 S.E.2d 779 (2007).

In a personal injury action, because an injured party failed to show that the landlords could not have had constructive notice of the deteriorated condition of the steps upon which that party fell and was injured, the landlords were not liable for their failure to keep the premises in repair. Thus, the landlords were properly granted summary judgment as to the issue of liability for the party's injuries. *Stelter v. Simpson*, 288 Ga. App. 402, 655 S.E.2d 237 (2007).

In a premises liability action filed by a repairman arising from injuries suffered while repairing a roof, because the trial court properly found that an out-of-possession landlord and its tenants who surrendered control of the owned premises did not ratify the repairman's employer's actions in not providing safety equipment, and did not have superior knowledge of the dangers involved, the out-of-possession landlord and its tenants were properly granted summary judgment in the repairman's premises liability action. *Saunders v. Indus. Metals & Surplus, Inc.*, 285 Ga. App. 415, 646 S.E.2d 294 (2007), cert. denied, 2007 Ga. LEXIS 624 (Ga. 2007).

The trial court properly granted summary judgment to a retailer, in a customer's negligence action filed against it for injuries sustained when a tomato tower punctured an eye, as the customer's injury arose out of a third party's actions which the retailer did not and could not have foreseen, and hence no evidence was presented that it breached a duty owed to the customer. *Thomas v. Home Depot, U.S.A., Inc.*, 284 Ga. App. 699, 644 S.E.2d 538 (2007).

Trial court properly granted summary judgment to an apartment complex owner,

and against the decedent's personal representative, in the latter's premises liability action against the former, as: (1) evidence was lacking that the vacant apartment where the decedent was murdered was negligently left unlocked; and (2) despite the criminal history of the area where the apartment was located, the owner had no reasonable belief to anticipate that a murder would have occurred on its premises. Moreover, guesses or speculation which raised merely a conjecture or possibility were insufficient to create even an inference of fact for consideration on summary judgment. *Wojcik v. Windmill Lake Apts., Inc.*, 284 Ga. App. 766, 645 S.E.2d 1 (2007), cert. denied, 2007 Ga. LEXIS 637 (Ga. 2007).

In a customer's personal injury action, a property owner was properly granted summary judgment, as it had no duty to foresee any danger from its criminally damaged pay phone falling on the customer's head, the way the injury occurred was not reasonably expected, and due to the fact that such could not occur except from the customer's unexpected acts. *McAfee v. ETS Payphones, Inc.*, 283 Ga. App. 756, 642 S.E.2d 422 (2007).

Because: (1) the undisputed evidence presented to the trial court was that a retailer had no knowledge of a hazard posed by a previously loaded BB gun placed on an open display shelf and accessible to children; and (2) a parent failed to show that it was reasonably foreseeable that the parent's child would take the gun and shoot the child's sibling, the trial court did not err in granting the retailer summary judgment as to the issue of its liability. *Roberts v. Wal-Mart Stores, Inc.*, 287 Ga. App. 316, 651 S.E.2d 464 (2007).

Because a painter failed to show that a homeowner's knowledge of an electrical wiring defect was superior to that of the painter, the homeowner was entitled to summary judgment as to the issue of the homeowner's liability. *Schuessler v. Bennett*, 287 Ga. App. 880, 652 S.E.2d 884 (2007), cert. denied, 2008 Ga. LEXIS 230 (Ga. 2008).

In a premises liability action, the trial court properly granted summary judgment to a participant in a contest held by a licensee, without considering the ques-

tion of whether the participant assumed the risk of falling by participating in a jump-rope in a suit and dress shoes, as that participant failed to show that the licensee had control over the condition of the premises where the contest was held, and had superior knowledge of the hazard or defect which allegedly caused the participant's injuries. *Dixon v. Infinity Broad. East, Inc.*, 289 Ga. App. 71, 656 S.E.2d 211 (2007).

Because a party injured in a fall admitted to having actual knowledge not only of the alleged hazard which caused the fall, but of the specific danger the hazard presented, and as a result, appreciated the danger involved, the trial court erred in denying summary judgment to the premises owner as to the issue of liability, given that based on the foregoing, the party should have avoided any injury in the exercise of ordinary care. *Callaway Gardens Resort, Inc. v. Bierman*, 290 Ga. App. 111, 658 S.E.2d 895 (2008).

Because a skating rink patron failed to present sufficient evidence showing that the rink owners breached a duty by failing to have identifiable floor guards on duty at the time of the patron's fall, and that the breach proximately caused the patron's injuries, but instead, the unequivocal evidence showed that a floor guard was on duty at that time of the fall, the trial court properly granted summary judgment to the owners as to the issue of the owner's liability. Moreover, testimony from other management personnel, who were not at the rink at the time of the fall, did not contradict the assistant manager's positive assertions or written report and did not create a material issue of fact. *Evans v. Sparkles Mgmt., LLC*, 290 Ga. App. 458, 659 S.E.2d 860 (2008).

Landlord and tenant actions.

After applying the rules of contract construction under O.C.G.A. §§ 13-2-2 and 13-2-3, the Court of Appeals of Georgia upheld an order granting summary judgment to a lessee, as it was not required to pay its portion of security related costs under the terms of its lease, according to the Common Area Costs formula contained therein; hence, it was authorized to refuse to pay those costs without being in breach of the lease agreement. *Covington*

Square Assocs., LLC v. Ingles Mkts., Inc., 283 Ga. App. 307, 641 S.E.2d 266 (2007).

In a case involving a commercial lease, because the tenant failed to prove all the elements of its constructive eviction defense, the landlord was properly granted summary judgment on its claim for rent and late fees; but because genuine fact issues remained as to the tenant's diminution of rent counterclaim when the landlord terminated the water service and for the time period the tenant was without water, as well as regarding the issue of whether the landlord waived a requirement that the tenant install a submeter, the landlord was not entitled to summary judgment regarding these issues. *Delta Cleaner Supply Co. v. Mendel Drive Assocs.*, 286 Ga. App. 227, 648 S.E.2d 651 (2007).

While the trial court properly granted summary judgment to a lessee regarding the enforcement of a lease provision barring removal of certain improvements to the leasehold originally made by the lessor's predecessor-in-interest, despite the lessor's demand that such be removed, given a non-waiver provision in the lease, and the fact that a demand for reimbursement for insurance premiums paid over the life of the lease could be made at any time, the landlord was entitled to the premiums. *Ranwal Props., LLC v. John H. Harland Co.*, 285 Ga. App. 532, 646 S.E.2d 730 (2007).

Specific performance of land sales contract. — In a buyer's suit seeking specific performance of a land sales contract that contained a clear and unambiguous clause stating that time was of the essence, the trial court properly granted summary judgment against the buyer, due to the buyer's failure to timely tender additional earnest money, and because that action amounted to a breach authorizing the sellers to terminate the agreement. *Chowhan v. Miller*, 283 Ga. App. 749, 642 S.E.2d 428 (2007).

Because the evidence presented at trial made it clear that a lessor conveyed no ownership interest to a tenant, leaving that tenant with only a right to possess and use the leased property, and more specifically, a usufruct, the tenant did not own an interest in the property, and thus

could not pursue an easement by necessity under O.C.G.A. § 44-9-40; hence, summary judgment in the lessor's favor as to this issue was upheld on appeal. *Read v. Ga. Power Co.*, 283 Ga. App. 451, 641 S.E.2d 680 (2007).

In an action seeking specific performance of a land sales contract, because genuine issues of material fact existed as to whether the \$45,000 sales price was adequate in relation to the fair market value of the subject property, and whether enforcement of the contract was equitable, the trial court erred in granting the buyers of that land summary judgment. *Weeks v. Rowell*, 289 Ga. App. 507, 657 S.E.2d 881 (2008).

Class action suit for breach of lease.

— Trial court properly dismissed a class action suit arising out of a breach of a lease agreement and filed by a group of uninsured patients against a hospital for failure to state a claim upon which relief could be granted, which the court converted to a motion for summary judgment, as the class members: (1) failed to timely object to the merits of the oral motion; (2) acquiesced to the evidence in support of the same; and (3) failed to show they were third-party beneficiaries of the agreement, with sufficient standing to sue upon a breach of its terms. *Davis v. Phoebe Putney Health Sys.*, 280 Ga. App. 505, 634 S.E.2d 452 (2006).

Commercial lease agreements. — In a lessor's action to enforce the provisions of a commercial lease pursuant to O.C.G.A. § 13-1-11, because a lessee's predecessor-in-interest failed to strictly comply with a cancellation option in the lease, and time was of the essence, the trial court erred in ruling otherwise, resulting in an expiration of the option due to the failure to timely exercise the option; thus, on remand the lessor was entitled to summary judgment on its possession claim and to the past rent due under the lease for the term sought. *Piedmont Ctr. 15, LLC v. Aquent, Inc.*, 286 Ga. App. 673, 649 S.E.2d 733 (2007), cert. denied, 2007 Ga. LEXIS 749 (Ga. 2007).

Equipment lease agreements. — In an action arising out of its lessee's breach of an equipment lease, the lessor was properly granted summary judgment, as a

claim that an affidavit from the lessor's valuation expert was raised for the first time on appeal and thus was not addressed, and the lessee could not complain that the equipment or delivery was defective, as the lessee took the equipment under the lease "as is." *Locke's Graphic & Vinyl Signs, Inc. v. Citicorp Vendor Fin., Inc.*, 285 Ga. App. 826, 648 S.E.2d 156 (2007).

Quiet title actions. — In quiet title actions initiated by each party regarding the same parcel of residential property, the trial court properly adopted a special master's order granting summary judgment in favor of a bank, who was the assignee of the holder of the loan secured by the property, finding that fee simple title vested in the bank, as the transfer of the property to the assignee of the holder of the security deed was valid when the deed under power was recorded; in the absence of any court order invalidating or setting aside that deed, the deed legally vested title in the property in the assignee of the holder of the security deed, and thus in the bank. *Vereen v. Deutsche Bank Nat'l Trust Co.*, 282 Ga. 284, 646 S.E.2d 667 (2007), cert. denied, 552 U.S. 1143, 128 S. Ct. 1089, 169 L. Ed. 2d 811 (2008).

Misappropriation of trade secrets.

— Because a doctor's patient list was not a trade secret within the meaning of the Georgia Trade Secrets Act, O.C.G.A. § 10-1-761(4)(A), and because an attorney the doctor sued for misappropriation was not in the same industry as the doctor, the attorney's possession of the list did not reduce the doctor's competitive advantage in the field, which was the main purpose of protecting a trade secret; thus, the attorney was entitled to summary judgment on the doctor's claim of misappropriation. *Vito v. Inman*, 286 Ga. App. 646, 649 S.E.2d 753 (2007), cert. denied, 2007 Ga. LEXIS 770 (Ga. 2007).

Tortious interference with business relations.

In an action alleging both tortious interference with business relations and a tortious interference with contract filed by an uncle against a nephew and the nephew's wife, summary judgment was properly entered against the uncle, as the evidence in support of the claims failed to

show that the nephew had an improper purpose; more specifically, as regarding the former claim, the evidence amounted to either hearsay or double hearsay, and as to the second claim, the nephew could act with privilege with regards to the contract at issue. *Kirkland v. Tamplin*, 285 Ga. App. 241, 645 S.E.2d 653 (2007), cert. denied, 2007 Ga. LEXIS 616 (Ga. 2007); 552 U.S. 1297, 128 S. Ct. 1750, 170 L.Ed.2d 541 (2008).

Tortuous interference with contracts. — Buyer's tortuous interference with contracts claims were properly disposed of on summary judgment as: (1) all parties to an interwoven contractual arrangement were not liable for tortuous interference with any of the contracts or business relationships; and (2) a claim for tortuous interference with contractual relations could not be predicated upon an allegedly improper filing of a lawsuit. *BKJB P'ship v. Moseman*, 284 Ga. App. 862, 644 S.E.2d 874, cert. denied, 2007 Ga. LEXIS 558 (Ga. 2007).

Intentional infliction of emotional distress. — The trial court properly entered summary judgment against an uncle, and in favor of the uncle's nephew and the nephew's wife, on the uncle's intentional infliction of emotional distress claim, as the complained of statements amounted to common expressions from family members and a common vicissitude of ordinary life, though given in a threatening tone of voice, and were not extreme and outrageous. *Kirkland v. Tamplin*, 285 Ga. App. 241, 645 S.E.2d 653 (2007), cert. denied, 2007 Ga. LEXIS 616 (Ga. 2007); 552 U.S. 1297, 128 S. Ct. 1750, 170 L.Ed.2d 541 (2008).

Because an employee failed in the burden of showing that the conduct and behavior of the employee's former manager did not, as a matter of law, qualify as extreme and outrageous conduct, the trial court properly granted summary judgment as to the issue of liability to the employee's former employer and former manager; moreover, while comments made within the context of one's employment might be horrifying or traumatizing, they were generally considered a common vicissitude of ordinary life. *Wilcher v. Confederate Packaging, Inc.*, 287 Ga. App. 451, 651 S.E.2d 790 (2007).

Official immunity. — The trial court properly granted summary judgment to a county school board and its superintendent in a parents negligence action arising out of an attack on school grounds that injured their daughter, as the board and the superintendent presented sufficient evidence that a school safety plan was in place at the elementary school at the time the child was attacked, entitling the board and the superintendent to official immunity barring the parents' negligence claims. *Leake v. Murphy*, 284 Ga. App. 490, 644 S.E.2d 328 (2007), cert. denied, 2007 Ga. LEXIS 671 (Ga. 2007).

In a tort action for personal injuries and property damage arising from an auto collision filed against a city and its police officer, the trial court properly granted summary judgment to the officer, given that the officer was engaged in a discretionary function of responding to an emergency situation at the time the accident at issue occurred. *Weaver v. City of Statesboro*, 288 Ga. App. 32, 653 S.E.2d 765 (2007), cert. denied, 2008 Ga. LEXIS 221 (Ga. 2008).

Personal injury.

In a personal injury action against a utility and its independent contractor, the trial court properly granted summary judgment against a cable installer, finding that: (1) the utility was not vicariously liable to the installer for the allegedly negligent acts of its contractor; (2) the utility's right to inspect the work did not render it liable for its contractor's negligence, as said right was intended for the limited purpose of making sure the contractor competently carried out the terms of the contract; (3) the utility was not liable for its failure to flag a power line trench in which the installer fell and was injured, as surface markings showing the path of the trench would not have informed the installer of the danger, and the installer was not injured as a result of excavating or blasting; and (4) the High-voltage Safety Act, O.C.G.A. § 46-3-30 et seq., did not apply to afford the installer a remedy. *Perry v. Georgia Power Co.*, 278 Ga. App. 759, 629 S.E.2d 588 (2006).

In a personal injury action against a vehicle's owner filed by an injured passen-

ger based on the negligence of the vehicle's driver, the trial court properly granted summary judgment to the owner, finding no liability under the family purpose doctrine because: (1) the driver was not a member of the owner's immediate household; and (2) the passenger failed to present competent evidence in response to the owner's summary judgment motion, as neither hearsay or evidence of conjecture and speculation was sufficient. *Patterson v. Lopez*, 279 Ga. App. 840, 632 S.E.2d 736 (2006).

A retailer was properly granted summary judgment in a personal injury action filed against it by one of its customers under the doctrine of *res ipsa loquitur* as the customer failed to show that the retailer retained exclusive control over the box that fell from its stationary position on a shelf and allegedly caused the customer's injuries, and the customer conceded that there was no evidence that the retailer had superior knowledge of an allegedly dangerous condition; further, the retailer was not required to show that its employees carried out an inspection of the shelved items within a reasonable time period before the incident. *Aderhold v. Lowe's Home Ctrs., Inc.*, 284 Ga. App. 294, 643 S.E.2d 811 (2007).

In a personal injury action filed by a husband and wife against a driver and that driver's employer, a negligent entrustment claim asserted against the employer was properly disposed of on summary judgment, but because the motion did not include both their negligent hiring and respondeat superior claims, and the husband and wife were not given full and fair notice that those claims were to be included in the motion, those claims also survived. *Parker v. Silviano*, 284 Ga. App. 278, 643 S.E.2d 819 (2007).

In a personal injury action arising from the electrocution of two construction workers while operating a crane leased by a buyer and seller of heavy equipment, the trial court properly denied summary judgment to the buyer/seller of the crane as material fact issues remained as to the condition of the crane when it left the buyer/seller's possession, and as to the element of causation; moreover, the learned intermediary doctrine did not ap-

ply. *Dozier Crane & Mach., Inc. v. Gibson*, 284 Ga. App. 496, 644 S.E.2d 333 (2007).

In a personal injury action arising from a fall suffered by a lessee's visitor from a pull-down staircase, because no questions of fact remained as to an out-of-possession landlord's liability for failure to repair, defective construction, or failure to warn, the landlord was properly granted summary judgment as to said issues. *Gainey v. Smacky's Invs., Inc.*, 287 Ga. App. 529, 652 S.E.2d 167 (2007).

Because a driver failed to present sufficient record evidence that a city received timely ante litem notice that the driver sustained a personal injury, much less the nature, character, or particularities of any such injury, but the notice submitted merely established that the driver sustained property damage, the driver did not substantially comply with O.C.G.A. § 36-33-5(b); thus, the trial court properly granted the city summary judgment on that issue. *Harris-Jackson v. City of Cochran*, 287 Ga. App. 722, 652 S.E.2d 607 (2007).

Recreational Property Act. — Trial court did not err in granting summary judgment to a city on allegations of negligence asserted against it by an injured motorcycle driver, as the Recreational Property Act (Act), O.C.G.A. § 51-3-20 et seq., prevented the driver from recovering from the city based on allegations of simple negligence; moreover, the Act clearly applied because it was undisputed that the injuries occurred when the driver collided with the cable fence on the city's recreational property, and the city permitted the general public to use the park and open field where the accident occurred for recreational purposes without charge. *Carroll v. City of Carrollton*, 280 Ga. App. 172, 633 S.E.2d 591 (2006).

Wrongful death. — Despite evidence of a parent's cruel treatment of the decedent, the trial court erred in finding that the parent forfeited parental rights, and thus lost the status as a parent and, in so doing, lost the right to recover as an heir of the decedent's estate, as the loss of parental power did not necessarily result in a parent's loss of a right to inherit as an heir from the estate of that parent's child, short of having the parent's rights termi-

nated prior to the child's death; hence, summary judgment against the parent on the issue was reversed. *Blackstone v. Blackstone*, 282 Ga. App. 515, 639 S.E.2d 369 (2006).

In a wrongful death action, because the employer of a driver was not responsible for the personal activities the employee was involved in at the time of the fatal accident that killed the decedent, and the special mission exception did not apply, the employer was properly granted summary judgment in a suit filed against it by the decedent's estate and survivors. *Banks v. AJC Intl., Inc.*, 284 Ga. App. 22, 643 S.E.2d 780 (2007).

In a wrongful death action filed against a county sheriff's deputy and the county, the administrator's claim that the deputy failed to report an accident and failed to render aid, in violation of both O.C.G.A. § 40-6-270(a)(3) and O.C.G.A. § 40-6-273, were rejected, and the deputy and the county were erroneously denied summary judgment, as the evidence showed that: (1) the deputy radioed for officer assistance; (2) the two officers looked for a second vehicle that might have been involved in the accident, to no avail; and (3) based on the same, no evidence existed that the deputy breached the duty imposed by § 40-6-273 *Purvis v. Steve*, 284 Ga. App. 116, 643 S.E.2d 380 (2007), cert. denied, 2007 Ga. LEXIS 517 (Ga. 2007).

In a wrongful death action filed on behalf of a deceased employee, because jury questions remained as to whether the defenses of assumption of the risk and equal knowledge of danger barred the claims of negligence, negligence per se, respondeat superior, and premises liability, and as to whether the claims were barred by the exclusive remedy provision of the Workers' Compensation Act, summary judgment to the decedent's employer was reversed. *Champion v. Pilgrim's Pride Corp. of Del., Inc.*, 286 Ga. App. 334, 649 S.E.2d 329 (2007), cert. denied, 2008 Ga. LEXIS 83 (Ga. 2008).

Because the trial court properly found that a decedent's son, as a sole heir, could recover at least a portion of a settlement under 45 U.S.C. § 51 for the wrongful death of the decedent, and because the

decedent father's widow validly waived a claim under 45 U.S.C. § 59, pursuant to a prenuptial agreement, the court did not err in granting partial summary judgment to the heir. But, the matter was remanded for the trial court to determine how the proceeds at issue should be divided between the survival and wrongful death claims. *Tadlock v. Tadlock*, 290 Ga. App. 568, 660 S.E.2d 430 (2008).

Slip and fall cases.

In a patron's slip and fall action filed against a home seller, the trial court properly found that the seller was entitled to summary judgment as a matter of law because the patron could not show that the seller's knowledge of the condition which allegedly caused the patron's fall, specifically, loose gravel on the ground immediately adjacent to unbuffered metal trailer tongues, was superior to the patrons. *Whitley v. H & S Homes, LLC*, 279 Ga. App. 877, 632 S.E.2d 728 (2006).

In a slip and fall action between a daughter and the daughter's mother, because the evidence showed that the daughter was a mere social guest or licensee in the mother's home at the time of the daughter's injury, present only in the home for the daughter's convenience, and the mother did not act with any intent to harm the daughter, the mother was properly granted summary judgment on the issue of liability for the daughter's personal injuries resulting from a slip and fall. *Behforouz v. Vakil*, 281 Ga. App. 603, 636 S.E.2d 674 (2006).

In a customer's slip and fall action against a store, because genuine issues of material fact existed as to whether the store had superior knowledge of the alleged water on the floor where the customer allegedly fell, summary judgment was erroneously entered in the store's favor. *Durham v. Patel*, 282 Ga. App. 437, 638 S.E.2d 851 (2006).

In a slip and fall action filed by a mall patron against the mall's owner and its cleaning contractor, summary judgment was properly granted to the latter, as no evidence was presented that it wrongfully failed to clean the spot on which the patron slipped; however, summary judgment in the owner's favor was reversed, as it failed to present evidence of any reason-

able inspection procedures, giving the patron the benefit of an inference of the owner's constructive knowledge of a hazard. *Prescott v. Colonial Props. Trust, Inc.*, 283 Ga. App. 753, 642 S.E.2d 425 (2007).

Premises owner was properly granted summary judgment in an occupant's personal injury action filed against it as the uneven and unstable brick-paved walkway where the occupant fell was an open and obvious static condition which the occupant was presumed to have knowledge of, given that the occupant had successfully traversed the area before; moreover, while the occupant might have disagreed with the trial court's application of the law to the facts presented, that disagreement did not warrant reversal. *Nemeth v. RREEF Am., LLC*, 283 Ga. App. 795, 643 S.E.2d 283 (2007).

The trial court did not err in granting summary judgment to a seller, in a buyer's personal injury action alleging negligence and nuisance, as: (1) speculation as to what caused the buyer's fall was insufficient to sustain the former; and (2) evidence was lacking that the seller created, continued, or maintained the alleged nuisance, or controlled the release of a discharge on the property that allegedly caused the buyer's slip and fall. *Grinold v. Farist*, 284 Ga. App. 120, 643 S.E.2d 253 (2007).

In a slip and fall case, the trial court properly granted summary judgment to a premises owner on grounds that: (1) no material issue of fact remained as to whether a roof repair contractor's injuries were caused by the owner's failure to keep the subject premises safe; (2) the contractor failed to present any evidence that a foreign substance or any unusual hazard on the roof surface caused the fall; (3) it was not raining on the day of the fall; and (4) prior to the fall, the contractor inspected the roof by walking the length of it and looking at it from below, satisfied that the area was safe. *Hardnett v. Silvey*, 285 Ga. App. 424, 646 S.E.2d 514 (2007).

Because the trial court correctly determined that the parking lot in which a customer fell was owned and maintained by grocery store's landlord, not by the grocery store, and was not an "approach" to the premises for purposes of O.C.G.A.

§ 51-3-1, the grocery store was properly granted summary judgment as to the issue of liability in a customer's personal injury suit filed against it. *Robinson v. Kroger Co.*, 284 Ga. App. 488, 644 S.E.2d 316 (2007).

Because an injured employee testified that the rain, and not any sloping surface, caused the slip and fall at issue, the employee was charged with equal knowledge of the rainy day conditions, and as a result no evidence was presented that the hospital exposed the employee to any unreasonable risk of harm; thus, the trial court erred in denying the employer's motion for summary judgment. *Sunlink Health Sys. v. Pettigrew*, 286 Ga. App. 339, 649 S.E.2d 532 (2007).

In a slip and fall case filed by a retailer's patron alleging a breach of the retailer's duty to keep its premises reasonably safe, the trial court properly granted summary judgment to the retailer on the issue of whether the retailer's nearby employees were in a position to discover the hazard on which the patron slipped, specifically a grape on the floor; however, in the absence of clear evidence of how long the grape was present on the floor, and in the absence of evidence that the retailer actually carried out its inspection procedures, the retailer could not show as a matter of law that it lacked constructive knowledge of the hazard which caused the patron's fall. *Blocker v. Wal-Mart Stores, Inc.*, 287 Ga. App. 588, 651 S.E.2d 845 (2007).

The court of appeals upheld an order granting summary judgment to a janitorial services company on claims filed against it by a premises owner's invitee for damages sustained by the invitee resulting from a slip and fall on the owner's premises, as the janitorial services company was an independent contractor and not an owner occupier of the premises where the invitee fell, and hence it owed no contractual duty to the invitee. *Taylor v. AmericasMart Real Estate, LLC*, 287 Ga. App. 555, 651 S.E.2d 754 (2007).

In a personal injury action arising out of a slip and fall, because jury questions existed as to whether a premises owner's inspection procedure was reasonable, the appeals court refused to say that the owner lacked constructive knowledge of a

hazard that allegedly caused a slip and fall as a matter of law. Thus, summary judgment entered in favor of the owner was reversed. *Gibson v. Halpern Enters.*, 288 Ga. App. 790, 655 S.E.2d 624 (2007).

In a premises liability action against a retailer, because the patron failed to show proof that a single employee of the retailer was in the immediate area of the spill that allegedly caused the patron's fall, and could have easily seen and removed the spill prior to the slip and fall, or proof that the liquid had been there for a sufficient length of time that the retailer should have discovered and removed the spill during a reasonable inspection and: (1) inasmuch as the purported hazard was not readily visible to the patron; and (2) the patron failed to establish that the retailer's employees, who were at least 20 to 30 feet away, could have easily seen and removed the spill, or that the liquid had been on the retailer's floor long enough that the retailer should have discovered and removed the spill during a reasonable inspection, the trial court erred in denying the retailer's motion for summary judgment as to the retailer's liability to the patron. *Kmart Corp. v. McCollum*, 290 Ga. App. 551, 659 S.E.2d 913 (2008).

Because genuine material fact issues remained as to whether a supermarket's inspection procedures in the area in which a customer fell were reasonable and whether a reasonable inspection procedure would have detected a mixture of blood and water on the floor, summary judgment in favor of the supermarket was reversed; moreover, the appeals court rejected the supermarket's claim that the customer had equal knowledge of the hazard since the customer had previously walked down the aisle before the customer fell there. *Food Lion, LLC v. Walker*, 290 Ga. App. 574, 660 S.E.2d 426 (2008).

Delivery drivers. — In a personal injury action filed by an injured driver, the trial court granted summary judgment to a bus delivery courier on grounds that the delivery person who the driver alleged caused the accident was an independent contractor, and not the courier's employee, as: (1) the courier did not control how the delivery person carried out the delivery of the bus, or what route to take in making

the delivery; (2) the delivery person was required to comply with all governmental requirements, was required to maintain log books, and was required to pay all incidental fees and taxes; and (3) a requirement that the bus be delivered the next day was placed on the delivery person by the buyer, and not the courier. *Larmon v. CCR Enters.*, 285 Ga. App. 594, 647 S.E.2d 306 (2007).

Probate of will.

In a probate action, because the testatrix's older four children failed in their burden of showing undue influence at the time that the will was executed, and an affidavit submitted by one of the testatrix's older children did not change this result, as such consisted of inadmissible hearsay, the superior court properly granted summary judgment to the testatrix's youngest child. *Barber v. Holmes*, 282 Ga. 768, 653 S.E.2d 448 (2007).

Promissory note.

After obtaining consent from the probate court to sell construction equipment an executrix's decedent secured with a promissory note, the executrix was entitled to summary judgment as to the tort claims alleged against the decedent's corporation, after the corporation wrongfully retained possession of said equipment, converted two certificates of deposit, and the decedent's liability on the notes was extinguished under a provision of a stock sales agreement; furthermore, evidence was presented that the corporation's failure to release the equipment prevented its sale to third parties and thereby constituted a breach of a duty to mitigate damages. *Midway R.R. Constr. Co. v. Beck*, 281 Ga. App. 412, 636 S.E.2d 110 (2006).

In an action to recover on two promissory notes, because material fact issues remained regarding the consideration given for the promissory notes, creating an ambiguity for which parol evidence was admissible, and as to whether the notes were signed as part of the same transaction, summary judgment to either the lender or the debtor was inappropriate. *Foreman v. Chattooga Int'l Techs., Inc.*, 289 Ga. App. 894, 658 S.E.2d 470 (2008).

Negotiable instruments. — Trial court did not err in granting summary

judgment to a bank and a credit union, on claims of conversion, civil conspiracy and for attorney fees and punitive damages, as: (1) no probative evidence existed that the buyer received delivery of the check, and thus, it never became a holder of the instrument at issue or entitled to enforce it; (2) no evidence was presented that the bank and credit union acted in concert against the buyer; (3) no evidence of misconduct or bad faith on the part of the bank or the credit union was presented; but, the trial court properly found that a genuine issue of material fact existed as to whether the bank and the credit union were holders in due course. *Hartsock v. Rich's Emples. Credit Union*, 279 Ga. App. 724, 632 S.E.2d 476 (2006).

Debtor and creditors.

In a foreclosure action between a bank and its debtors, given that the debtors failed to substantiate the claims of error asserted on appeal with sufficient evidence to create a jury question, and the bank committed no wrong in attempting to collect on a prior judgment against the debtors, summary judgment was properly entered to the bank, disposing of all the debtors' counterclaims filed against it. *All Fleet Refinishing, Inc. v. W. Ga. Nat'l Bank*, 280 Ga. App. 676, 634 S.E.2d 802 (2006).

In an action to recover the balance of the money owed under a loan, because the guarantor of the loan failed to show the lack of an adequate foundation for the admitted evidence, a claim that the trial court erred in admitting the loan history report as a business record failed; hence, the proponent bank was properly granted summary judgment on the issue. *Ishak v. First Flag Bank*, 283 Ga. App. 517, 642 S.E.2d 143 (2007).

The trial court's order granting summary judgment to a collection company, and against a debtor, in the former's deficiency action, was upheld on appeal, as it was not based on inadmissible hearsay, but upon records admissible under the business records exception to the hearsay rule, and was dispositive of the debtor's counterclaims, which arose out of the company's request for a deficiency judgment. *Boyd v. Calvary Portfolio Servs.*, 285 Ga. App. 390, 646 S.E.2d 496 (2007).

Because genuine material fact issues remained as to a portion of the indebtedness owed to a creditor by a debtor, the creditor was not entitled to summary judgment as to that portion; moreover, the debtor was not entitled to a credit for its payment to the creditor, as one of the signatories on the account admitted that such was made on behalf of another corporation the debtor's president and vice-president owned. *Sweet Water Tree Farm, Inc. v. J. Frank Schmidt & Son, Inc.*, 287 Ga. App. 455, 651 S.E.2d 787 (2007).

Action to collect unpaid credit card

debt. — Because an action filed by a creditor to collect unpaid credit card charges was based on a written contract, and not an open account, the trial court properly held that the six-year limitations period under O.C.G.A. § 9-3-24 applied, supporting summary judgment in the creditor's favor; moreover, because the transaction at issue was a written contract, the form of the debtor's acceptance was immaterial. *Hill v. Am. Express*, 289 Ga. App. 576, 657 S.E.2d 547 (2008), cert. denied, 2008 Ga. LEXIS 490 (Ga. 2008).

Foreclosure actions. — Because the debtor failed to send written notice of the correct address of the subject property to the bank or its agents, and could not assert an absent grantee's priority to escape the consequences of his own failure to provide a correct property address to all future holders of the note and deed, the foreclosure sale was not set aside; thus, the trial court properly granted summary judgment to the bank and the assignees of the security interest on the ground that the bank provided sufficient notice of the foreclosure sale. *Jackson v. Bank One*, 287 Ga. App. 791, 652 S.E.2d 849 (2007), cert. denied, 2008 Ga. LEXIS 169 (Ga. 2008).

Repossession of vehicle.

In a civil action arising from a creditor's repossession of a debtor's vehicle, summary judgment on a debtor's conversion and punitive damages claims against a creditor was reversed, as the trial court erroneously found that the debtor's failure to demand that the creditor return the subject vehicle was fatal to the claim, given that creditor wrongfully repossessed and then sold the car subject to the

parties' finance agreement, and hence no demand was necessary; but, as the debtor did not challenged summary judgment on her emotional distress claim, the judgment was upheld. *Williams v. Nat'l Auto Sales, Inc.*, 287 Ga. App. 283, 651 S.E.2d 194 (2007).

Local government personnel issues. — Because a county tax commissioner's employees were within the county's civil service system, the county was properly granted summary judgment, and hence, the county's personnel director was authorized to refuse to implement raises to the employees as the commissioner sought; moreover, the commissioner's reliance on O.C.G.A. § 36-1-21 did not change the result, as that statute expressly applied only to civil service systems created by county governing authorities, and the civil service system at issue was created by the Georgia General Assembly. *Ferdinand v. Bd. of Comm'rs*, 281 Ga. 643, 641 S.E.2d 787 (2007).

Exclusivity doctrine of the Georgia Workers' Compensation Act.

In a wrongful death action, the trial court erred in denying an employer's motion for summary judgment against the claims filed by the decedent's parents, as those claims were limited by the exclusivity provisions of the Georgia Workers' Compensation Act, given evidence that the decedent's death arose out of and in the course of employment, pursuant to O.C.G.A. § 34-9-1(4). *Burns Int'l Sec. Servs. Corp. v. Johnson*, 284 Ga. App. 289, 643 S.E.2d 800 (2007).

State preemption of county ordinance. — Because the plain language of O.C.G.A. § 16-11-173 expressly precluded a county from regulating the carrying of firearms in any manner, a county ordinance attempting to regulate the carrying of firearms was preempted by the statute; thus, the trial court erred in concluding otherwise and by denying summary judgment to a citizen and advocacy group on those grounds. *GeorgiaCarry.Org, Inc. v. Coweta County*, 288 Ga. App. 748, 655 S.E.2d 346 (2007).

Consignment. — While a buyer of a motor home on consignment was entitled to summary judgment after the dealer never paid the consignors, when the con-

signors refused to execute an assignment and warranty of title when the buyer sought the same, the buyer was entitled to damages, including reasonable attorney's fees under O.C.G.A. § 40-3-32(a) caused thereby. *Smith v. Hardeman*, 281 Ga. App. 402, 636 S.E.2d 106 (2006).

Tort action.

Trial court did not err in granting summary judgment to the defendants in a tort action, based on a bankruptcy court's order confirming their Chapter 11 plan, which discharged the tort claim and barred the plaintiffs from continuing their suit, as the plaintiffs did not dispute that their tort claim was within the scope of the defendants' discharge in bankruptcy; further, the trial court correctly concluded that such constituted a defense which barred the plaintiffs' tort action to collect the discharged claim. *Roy v. Garden Ridge, L.P.*, 283 Ga. App. 74, 640 S.E.2d 665 (2006).

In a parent's suit as a next friend to the parent's daughter, the trial court erred in denying summary judgment to a retailer and its employees on the parent's claim of tortious misconduct, as no evidence was presented that the child victim was the retailer's business invitee, but was merely a licensee under both O.C.G.A. §§ 51-3-1 and 51-3-2, as the child merely entered the business with the sole intent to use the restroom; however, summary judgment was properly denied as to the invasion of privacy, intentional infliction of emotional distress, false imprisonment, false arrest and damages claims filed by the parent against the defendants. *Todd v. Byrd*, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, *Ferrell v. Mikula*, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

In a suit between feuding neighbors, the trial court properly held that the words spoken by one against the other, which the latter alleged were disparaging against America's loss on September 11, 2001, were not slanderous, as they were an expression of pure opinion, which was neither provable as true nor as false; as a result, the neighbor who uttered the allegedly slanderous comments was entitled to summary judgment on the other's claim of slander per se. *Bullard v. Boulter*, 286 Ga. App. 218, 649 S.E.2d 311 (2007).

Stalking arising to invasion of privacy. — Because: (1) evidence was presented that the appellee denied the intent required under the stalking statute, O.C.G.A. § 16-5-90; and (2) a motion quashing a subpoena for the appellee's cell phone records was proper, as those cell phone records were not reasonably calculated to lead to the discovery of admissible evidence or information relevant to the intrusiveness of the appellee's behavior, the trial court properly denied partial summary judgment on the appellant's stalking claim and entered an order quashing a subpoena for appellee's cell phone records; but, because the appellee's alleged repeated actions of following the appellant and taking pictures arose to an invasion of privacy, summary judgment was inappropriate. *Anderson v. Mergenhausen*, 283 Ga. App. 546, 642 S.E.2d 105 (2007).

Products liability.

Because: (1) a couple failed to present sufficient evidence to show an original manufacturing defect in their used car at the time it left the car's manufacturer; (2) two product recalls did not apply to the vehicle; and (3) the doctrine of *res ipsa loquitur* did not apply, summary judgment was properly granted to the car's manufacturer on the couple's negligent manufacturing, failure to warn, and one of the spouse's loss of consortium claim; moreover, even if the trial court erred in considering the affidavits submitted by the manufacturer's expert, such did not amount to reversible error. *Miller v. Ford Motor Co.*, 287 Ga. App. 642, 653 S.E.2d 82 (2007).

Privileged communications. — An attorney's statements regarding a doctor made in the form of two phone messages to the doctor's patients were privileged as they were made in anticipation of a lawsuit the attorney was preparing to file, were not slanderous, and did not interfere with the doctor's business relations; thus, the attorney was entitled to summary judgment on the doctor's claims of slander and tortious interference with business relations. *Vito v. Inman*, 286 Ga. App. 646, 649 S.E.2d 753 (2007), cert. denied, 2007 Ga. LEXIS 770 (Ga. 2007).

Statutes of limitations.

In a medical malpractice action, because the trial court erroneously applied the five-year statute of repose contained in O.C.G.A. § 9-3-71(b), and not O.C.G.A. § 9-3-73, in finding that the parents' amended negligence complaint against certain doctors and nurses was time-barred, the trial court erred in entering summary judgment against the parents; further, the trial court also erred in finding that the doctors and nurses were rendering care to only the mother, and not the mother and the newborn child. *Johnson v. Thompson*, 286 Ga. App. 810, 650 S.E.2d 322 (2007), cert. denied, 2008 Ga. LEXIS 90 (Ga. 2008).

Because a sublessee failed to file its claims under a divisible sublease within the six-year period after they arose, pursuant to the requirements of O.C.G.A. § 9-3-24, and a different limitations period applicable to construction contracts and express warranties did not apply, partial summary judgment to the sublessor as to the time-barred claims was properly entered. *New Morn Foods, Inc. v. B & B Egg Co.*, 286 Ga. App. 29, 648 S.E.2d 428 (2007).

Because a belated claim in a breach of contract action filed against an alleged homebuilder's partner did not relate back to the date of the original complaint, as required by O.C.G.A. § 9-11-15(c), summary judgment in favor of the homebuilder was correctly granted, based on the expiration of the six-year limitation period under O.C.G.A. § 9-3-24. *Wallick v. Lamb*, 289 Ga. App. 25, 656 S.E.2d 164 (2007).

Inverse condemnation action.

The trial court properly granted partial summary judgment to a county in an action filed against the county by a competitor in the water supply business, because a claim of inverse condemnation arising from the county's operation of a competing water supply system and resulting loss of business was not based on physical damage to the competitor's property, but rather left the claim extant, whether advanced under a theory of trespass or inverse condemnation. *Jones v. Putnam County*, 289 Ga. App. 290, 656 S.E.2d 912 (2008).

Abusive litigation.

Because the Court of Appeals of Georgia merely found in a prior action between the parties that an employer failed to prove its claims against its former employee at trial, and that holding did not amount to a binding determination that those claims were without substantial justification or that the employer engaged in abusive litigation, the trial court properly granted summary judgment to the employer as to the former employee's abusive litigation claims; moreover, although questions of reasonableness were generally for the jury, given that the employer was successful at every stage of the litigation prior to the appeal, the trial court was authorized to determine as a matter of law that the company acted in good faith in filing and pursuing its claims. *Bacon v. Volvo Serv. Ctr., Inc.*, 288 Ga. App. 399, 654 S.E.2d 225 (2007).

Punitive damages.

Because the appeals court found that other intentional tort claims survived summary judgment which would authorize the imposition of punitive damages if the jury were to find that a retailer and its employees acted with a wanton disregard of a nine-year-old child's rights, the trial court did not err by denying summary judgment on these grounds. *Todd v. Byrd*, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, *Ferrell v. Mikula*, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

In a legal malpractice action, because the evidence sufficiently showed that the client was precluded from seeking punitive damages in the underlying suit against the opposing party, the attorney being sued was properly granted summary judgment on the issue. *Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625, 658 S.E.2d 178 (2008).

Tax issues.

Because taxpayer's assignee lacked standing to claim a refund of ad valorem taxes allegedly overpaid by its assignor, the trial court erred in finding that the assignee was entitled to the refund; as a result, the court also erred in denying the respective counties summary judgment on the issue. *Clayton County v. HealthSouth Holdings, Inc.*, 288 Ga. App. 406, 654 S.E.2d 143 (2007).

Sovereign immunity.

In an action arising out of an arrest, despite the way the arrestee was treated, the trial court properly dismissed a complaint against a county, and granted summary judgment on the same complaint against a city, on sovereign immunity grounds and because the arrestee failed to show that the immunity had been waived. *Scott v. City of Valdosta*, 280 Ga. App. 481, 634 S.E.2d 472 (2006).

In a tort action for personal injuries and property damage arising from an auto collision filed against a city, because the facts did not involve an officer's pursuit of a fleeing suspect, or damages caused by a fleeing suspect, O.C.G.A. § 40-6-6 did not apply to the action, and thus, the trial court erred in relying on the statute as a ground for granting summary judgment to the city on sovereign immunity grounds. *Weaver v. City of Statesboro*, 288 Ga. App. 32, 653 S.E.2d 765 (2007), cert. denied, 2008 Ga. LEXIS 221 (Ga. 2008).

Official immunity for discretionary acts. — As a student's personal injury damages claims against three school employees were based on the employees negligent failure to supervise the student when the student was with a non-party, and that such failure allegedly led to the student being molested by the third-party, the supervisory decisions made were discretionary acts requiring personal deliberation and judgment; hence, any reliance on O.C.G.A. § 19-7-5 did not provide a basis for civil liability against the employees for a negligent breach of a ministerial duty, and the student's claims were barred by the doctrine of official immunity as a matter of law. *Reece v. Turner*, 284 Ga. App. 282, 643 S.E.2d 814 (2007).

Premises liability.

In a wrongful death action premised on both negligence and negligence per se filed on behalf of a mother's deceased minor son, a premises owner was properly granted summary judgment, as the independent contractor that hired the decedent, and not the premises owner, had sole control over its personnel, and the son's hazardous occupation on the owner's premises for a third party did not in and of itself demonstrate that the owner was in violation of Georgia's child labor laws;

thus, the appeals court declined to reach the issue of whether an owner who knew or had reason to know that its independent contractor was employing a minor under the age of 16 to perform a dangerous occupation on the owner's premises was in violation of O.C.G.A. § 39-2-2. *Benson-Jones v. Sysco Food Servs. of Atlanta, LLC*, 287 Ga. App. 579, 651 S.E.2d 839 (2007).

Reimbursement under indemnity agreement.

Order granting summary judgment to an LLC was upheld, when, under the plain terms of an indemnity provision between the LLC and one of its shareholders, the shareholder was liable for costs associated with defending claims made by its agent against the LLC; but, the shareholder was not liable for costs associated with a suit over the payment of commissions, as such did not relate to the marketing and sales efforts covered by the indemnity clause and undertaken by the shareholder. *SRG Consulting, Inc. v. Eagle Hosp. Physicians, LLC*, 282 Ga. App. 842, 640 S.E.2d 306 (2006).

Divorce. — Because questions pertaining to alimony, property, and all other issues of the marriage were intended to be covered by the parties' prior separation agreement in the event the parties divorced, and the wife freely entered into the agreement, her subsequent claim for alimony and an interest in the marital home were properly dismissed via summary judgment. *D'Errico v. D'Errico*, 281 Ga. 508, 640 S.E.2d 30 (2007).

Propriety of Summary Judgment

Absence of genuine issue and entitlement to judgment are prerequisites. — Because the strategies by a county and the municipalities within the county under the Service Delivery Strategic Act, O.C.G.A. § 36-70-20 et seq., had nothing to do with a developer's actions, given that it was not the decision of the developer, or any individual property owner, to control the property owner's supplier of water, the developer was properly granted summary judgment in a city's action for declaratory and injunctive relief. Also, the city's quest to overturn the May 2005 service delivery strategy was

rendered moot by the enactment of later strategy. *City of Demorest v. Town of Mt. Airy*, 282 Ga. 653, 653 S.E.2d 43 (2007).

In a suit filed by the car owner against a lienholder for wrongful repossession and conversion of the subject vehicle, summary judgment to the lienholder and partial summary judgment to the owner was inappropriate given that questions of fact remained as to whether the vehicle was on a lienholder's debtor's lot for repairs, or if the vehicle had been sold or consigned to the debtor, and was thus subject to the lienholder's security interest. *Gavahi-Kashani v. Auto. Fin. Corp.*, 286 Ga. App. 69, 648 S.E.2d 672 (2007).

Because material fact questions remained regarding the quality of a utility company's inspection and whether it had constructive knowledge of an electrical wiring defect outside of a homeowner's home, summary judgment was properly denied. *Schuessler v. Bennett*, 287 Ga. App. 880, 652 S.E.2d 884 (2007), cert. denied, 2008 Ga. LEXIS 230 (Ga. 2008).

Lack of jury issue.

Because there was no dispute that: (1) the owner sold the property to a tenant obtained by the realty firm and that the sale occurred during the lease term; and (2) the realty firm satisfied the precedent terms under its commission agreement with the owner entitling the firm to a full commission and prejudgment interest thereon, the trial court erred in denying the realty firm summary judgment on this claim. *Tommy McBride Realty v. Nicholson*, 286 Ga. App. 135, 648 S.E.2d 468 (2007).

In an action arising from the sale of a condominium unit, because there was no issue of material fact as to whether the declaration of condominium's "lender" exception applied to the sale of the unit to the buyer, the trial court erred in concluding that the issue was for the jury. *Quality Foods, Inc. v. Smithberg*, 288 Ga. App. 47, 653 S.E.2d 486 (2007), cert. denied, 2008 Ga. LEXIS 316 (Ga. 2008).

Improper if genuine issue exists.

Because the record revealed that a family's action for trespass, continuing trespass, intentional infliction of emotional distress, and declaratory judgment was timely filed, and jury questions remained

as to the issues of abandonment and the family's standing to bring their suit against a developer who allegedly destroyed the family's cemetery, summary judgment was erroneously awarded to the developer. *Ceasar v. Shelton Land Co.*, 285 Ga. App. 421, 646 S.E.2d 689 (2007).

In an action to invalidate an allegedly forged quitclaim deed filed by a husband, which transferred an interest in certain property to the husband's wife, summary judgment was erroneously granted to the husband, as a bankruptcy trustee presented sufficient evidence of disputed issues of material fact concerning the husband's equitable claim; hence, the matter was remanded for further proceedings under the Quiet Title Act, O.C.G.A. § 23-3-60 et seq. *Hurst v. Evans*, 284 Ga. App. 274, 643 S.E.2d 824 (2007).

Because an actual and ongoing controversy existed regarding the rights of competing parties to a condominium unit, specifically the unit's owners and its buyer and disputes the concerning ownership of or right of access to land were classic candidates for resolution via declaratory judgment, the trial court correctly denied the owners' motion for summary judgment on the buyer's counterclaim for declaratory judgment. *Quality Foods, Inc. v. Smithberg*, 288 Ga. App. 47, 653 S.E.2d 486 (2007), cert. denied, 2008 Ga. LEXIS 316 (Ga. 2008).

Because a genuine dispute precluded the recovery of attorney fees from the attorney by the client based upon the client's claim of stubborn litigiousness, summary judgment was reversed. *Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625, 658 S.E.2d 178 (2008).

Summary judgment for plaintiff.

In an action filed by a trust on a promissory note and guaranty against a guarantor, the trial court properly granted the trust summary judgment, as the guarantor's unsworn affidavit did not qualify as competent evidence creating a factual issue as to the issue of whether the guarantor was entitled to a setoff; moreover, the court disagreed that the guaranty showed that the guarantor signed the guaranty in a representative capacity. *Keane v. Annice Heygood Trevitt Support Trust*, 285 Ga. App. 155, 645 S.E.2d 641 (2007).

Strict liability for injury caused by animal.

After an 83-year-old victim died after being attacked by an alligator inhabiting a man-made lagoon maintained by a homeowner association, and the victim's estate filed suit and asserted negligence and premises liability claims for knowingly creating and maintaining a habitat for alligators in close proximity to residential and recreational areas, and after the homeowner association moved for summary judgment, the trial court properly denied the motion because whether the risk of an alligator attack was foreseeable, whether the association acted reasonably to prevent such an attack, and whether the decedent understood the danger the decedent might encounter walking near the lagoon and nevertheless failed to exercise ordinary care for the decedent's own safety were issues of fact for resolution by the jury. The evidence was undisputed that the homeowner association had actual knowledge that alligators were commonly present throughout the lagoon system; as such, the court could not conclude as a matter of law that the association could not reasonably foresee that the alligators would constitute a danger to people using the adjacent common areas and golf courses. *Landings Ass'n v. Williams*, 309 Ga. App. 321, 711 S.E.2d 294 (2011).

Summary judgment improperly reversed. — Analyzing a personal injury action filed against an insured, and a declaratory judgment action subsequently filed by its insurer, the Court of Appeals of Georgia erred in holding that an insured was estopped from asserting compliance with its insurer's policy provisions regarding notice, and additionally erred, on that basis, in reversing the denial of summary judgment to the insurer in its declaratory judgment action, as neither *res judicata* nor collateral estoppel barred inquiry into the question of whether the insureds' notice of a lawsuit to the insurer was timely. *Karan, Inc. v. Auto-Owners Ins. Co.*, 280 Ga. 545, 629 S.E.2d 260 (2006).

Summary judgment improperly denied.

Vacation and remand of the denial of a motion for summary judgment by the principals of a corporation was appropri-

ate because the trial court denied the motion for the reason that the principals did not present sworn statements to negate alleged facts, but the court did not consider the issues pertaining to the ground that was asserted by the principals in the motion. *Meredith v. Thompson*, 312 Ga. App. 697, 719 S.E.2d 592 (2011).

Subject matter jurisdiction is a matter in abatement to be resolved pursuant to § 9-11-12(b). — Because subject matter jurisdiction is a matter in abatement, it had to be resolved on a motion pursuant to O.C.G.A. § 9-11-12(b), and not by a motion for summary judgment. *First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc.*, 282 Ga. 883, 655 S.E.2d 605 (2008).

When proof of spoliation present. — Given proof of spoliation under O.C.G.A. § 24-2-22 in an action filed against a tavern pursuant to Georgia's Dram Shop Act, O.C.G.A. § 51-1-40(b), the trial court erred in granting summary judgment to an injured party's guardian, as the tavern's manager was aware of the potential for litigation and failed to preserve whatever videotaped evidence might have been captured as to whether one of its intoxicated patron's would soon be driving; hence, a rebuttable presumption arose against the tavern that the evidence destroyed would have been harmful to the tavern, rendering summary judgment inappropriate. *Baxley v. Hakiel Indus.*, 282 Ga. 312, 647 S.E.2d 29 (2007).

Conversion from motion to dismiss. — Because the trial court, without objection, considered a contract between the parties and both parties relied heavily on the contract language before the trial court, the movant's motion to dismiss was converted to a motion for summary judgment under O.C.G.A. § 9-11-12(b). *Cox v. Athens Reg'l Med. Ctr., Inc.*, 279 Ga. App. 586, 631 S.E.2d 792 (2006).

Partial summary judgment. — In an action between a car dealer and its customer, the trial court did not err in granting partial summary judgment to the former, on the latter's claims for fraud, willful misrepresentation, theft, conversion, compensatory and punitive damages, and travel expenses, as the claims

would have ultimately failed at the bench trial; thus, the propriety of the trial court's partial summary judgment order on these claims was a moot question and was not addressed by the court. *Rise v. GAPVT Motors, Inc.*, 288 Ga. App. 246, 653 S.E.2d 320 (2007).

Because: (1) evidence demonstrating an agency relationship between the grantees and the grantor of a security deed was lacking, and (2) the mere lapse of time was insufficient to establish the affirmative defense of laches, partial summary judgment was properly entered in the trustee's favor on that claim based on mutual mistake, as well as an order invalidating the foreclosure sale upon the deed. *Harvey v. Bank One, N.A.*, 290 Ga. App. 55, 658 S.E.2d 824 (2008).

Burdens on Motion for Summary Judgment

2. Burden on Movant Generally

Burden of showing lack of genuine issue and entitlement to judgment.

Because an insurer carried its burden of showing that the representation of an insured's business was false, and that the representation was material in that the representation changed the nature, extent, or character of the insurance coverage risk, the trial court did not err in granting the insurer summary judgment. *Marchant v. Travelers Indem. Co.*, 286 Ga. App. 370, 650 S.E.2d 316 (2007).

Prima facie case not established.

In an action to collect on a debt filed by a creditor's assignee, the trial court erroneously granted summary judgment in the amount of the debt owed, plus interest because the assignee failed to attach to either the motion for summary judgment or affidavit prepared by the legal account manager the necessary documents that purported to establish the debt owed by the debtor. *Powers v. Hudson & Keyse, LLC*, 289 Ga. App. 251, 656 S.E.2d 578 (2008).

3. Burden on Nonmovant

Options of respondent to motion.

Summary judgment was not authorized merely because a defendant filed a one-page response that contained no sub-

stantive argument and failed to comply with Ga. Unif. Super. Ct. R. 6.5. *Milk v. Total Pay & HR Solutions, Inc.*, 280 Ga. App. 449, 634 S.E.2d 208 (2006).

Upon a wife's request for year's support, because a son never presented argument or evidence to contest the amount sought by the wife, never sought a hearing on the same, and failed to rebut the wife's claim of entitlement to said support, the son's claims of error on appeal from an order granting the wife summary judgment in the superior court lacked merit. In *re Estate of Avery*, 281 Ga. App. 904, 637 S.E.2d 504 (2006).

Burden shifts to nonmovant when prima facie showing made.

Pretermitted whether the trial court correctly determined that no benefits had been paid under Georgia's Workers' Compensation Act, and thus the employer had no right of subrogation to the tort claim settlement proceeds, the trial court's order granting partial summary judgment to the employee extinguishing the employer's subrogation lien had to be affirmed, as the employer failed to carry its burden of showing that its injured employee was fully and completely compensated within the meaning of O.C.G.A. § 34-9-11.1(b). *Paschall Truck Lines, Inc. v. Kirkland*, 287 Ga. App. 497, 651 S.E.2d 804 (2007).

When motion to dismiss is converted. — When matters outside the pleadings are considered by the trial court on a motion to dismiss for failure to state a claim, the motion is converted to a motion for summary judgment pursuant to O.C.G.A. § 9-11-56, and the trial court has the burden of informing the party opposing the motion that the court will consider matters outside the pleadings and that, if the opposing party so desires, the party has no less than 30 days to submit evidence in response to the motion for summary judgment; moreover, when patients in a class action suit against a hospital acquiesced in the hospital's submission of evidence in support of their motion to dismiss, and in effect, requested that the motion be converted into one for summary judgment by submitting evidence and by urging the trial court and the appeals court to consider it, the patients waived the right to any formal

30-day notice from the trial court. *Davis v. Phoebe Putney Health Sys.*, 280 Ga. App. 505, 634 S.E.2d 452 (2006).

Reference to depositions filed after summary judgment motion not permitted. — Because depositions relied upon by a husband and wife in their personal injury and loss of consortium action were not filed prior to the time a motion for summary judgment was ruled upon, their reference to the testimony contained therein could not be considered, and their brief in opposition to the summary judgment motion citing the testimony was not proper evidence for opposing the motion. *Parker v. Silvano*, 284 Ga. App. 278, 643 S.E.2d 819 (2007).

Failure to present evidence of actual knowledge supporting negligent entrustment claim. — In a personal injury action asserting negligent entrustment, because the injured party failed in the burden of presenting evidence that a passenger in the opposing vehicle had actual knowledge of the incompetent driving of that vehicle's driver, or of facts from which such knowledge could be inferred, due to that driver's intoxication, summary judgment in the passenger's favor was properly entered; the injured party failed to prove an essential element of the entrustment claim. *Williams v. Ngo*, 289 Ga. App. 44, 656 S.E.2d 193 (2007).

Evidence on Motion

1. In General

Conversion from motion to dismiss. — When matters outside the pleadings are considered by the trial court on a motion to dismiss for failure to state a claim, the motion is converted to a motion for summary judgment pursuant to O.C.G.A. § 9-11-56, and the trial court has the burden of informing the party opposing the motion that the court will consider matters outside the pleadings and that, if the opposing party so desires, the party has no less than 30 days to submit evidence in response to the motion for summary judgment. *Morrell v. Wellstar Health Sys., Inc.*, 280 Ga. App. 1, 633 S.E.2d 68 (2006).

Complaint is not evidence, etc.

A patient's complaint was not evidence

and thus could not be considered in deciding a motion for summary judgment. *Wellstar Health Sys. v. Painter*, 288 Ga. App. 659, 655 S.E.2d 251 (2007).

Improper legal standard in withdrawal of admissions. — Because the trial court applied the wrong legal standard in refusing to allow defendants to withdraw their admissions, and should have applied the standard set forth in O.C.G.A. § 9-11-36(b) and considered whether withdrawal would serve the presentation of the merits and whether it would prejudice plaintiffs, summary judgment was improper; moreover, the trial court erroneously held that summary judgment was proper because defendants had shown no excuse for their former counsel's failure to respond to the plaintiffs request for admissions, as defendants were not required to make such a showing. *Sayers v. Artistic Kitchen Design, LLC*, 280 Ga. App. 223, 633 S.E.2d 619 (2006).

Completion of discovery not required before ruling on motion. — In an action by the children of a decedent against the operators of a nursing home, the trial court was not required to allow the children to complete discovery before ruling on the operators' motion for summary judgment. If the children needed additional discovery for their response to the motion, the children should have invoked O.C.G.A. § 9-11-56(f). *Carr v. Kindred Healthcare Operating, Inc.*, 293 Ga. App. 80, 666 S.E.2d 401 (2008).

Untimely submission of nonmovant's evidence. — When a debtor, faced with a creditor's motion for summary judgment supported by an affidavit, did not timely respond with an affidavit or other evidence placing the facts supported by the creditor's affidavit in dispute, the debtor waived the right to present evidence in opposition to the motion, and the trial court did not abuse its discretion in declining to consider the untimely affidavits submitted by the debtor. *Gerben v. Beneficial Ga., Inc.*, 283 Ga. App. 740, 642 S.E.2d 405 (2007).

2. Admissibility of Evidence

Inadmissible hearsay. — A ride safety checklist had not been authenticated as a

business record and thus was merely inadmissible hearsay that could not be considered as evidence in support of a motion for summary judgment. *Valentin v. Six Flags Over Ga., L.P.*, 286 Ga. App. 508, 649 S.E.2d 809 (2007).

Medical narrative reports. — In a wrongful death suit brought by a minor son's parents, alleging negligence and police misconduct arising out of an incident in which emergency surgery on their son was delayed due to police detention of the doctor who was to perform the surgery, summary judgment was improperly granted to the hospital, the hospital's security officer, and the police officer on a finding that there was no issue of fact as to causation; the medical narrative report prepared by the doctor was admissible evidence under O.C.G.A. § 24-3-18(a) and could be considered in opposition to a motion for summary judgment under O.C.G.A. § 9-11-56(c), in that the doctor's opinion in the report that the son, "in all likelihood," would have survived had the doctor not been prevented from caring for the son constituted a properly expressed medical opinion. *Dalton v. City of Marietta*, 280 Ga. App. 202, 633 S.E.2d 552 (2006).

3. Conclusory Statements

Ultimate or conclusory facts and conclusions of law, etc.

In a medical malpractice action, a physician's affidavit submitted by the nonmovants was properly struck as being merely conclusory as the affidavit referred to the standard of care but did not state what the standard of care was; an affidavit that stated no particulars was not sufficient to rebut a motion for summary judgment. *Whitley v. Piedmont Hosp., Inc.*, 284 Ga. App. 649, 644 S.E.2d 514 (2007), cert. denied, 2007 Ga. LEXIS 626, 651 (Ga. 2007).

4. Affidavits

A. In General

Showing that no jury issue existed is sufficient. — There was no merit to a customer's argument that because a corporation and employee did not file any affidavits or other sworn testimony, sum-

mary judgment could not be granted in their favor; they simply had to show that no jury issue existed as to an essential element of the customer's claim. *Kirkland v. Earth Fare, Inc.*, 289 Ga. App. 819, 658 S.E.2d 433 (2008).

Unexplained contradictory portions of affidavits.

Trial court properly refused to consider contradictory testimony in the participant's affidavit submitted in opposition to a motion for summary judgment since statements in the affidavit contradicted the deposition testimony, and the record contained no explanation for those contradictions; while the trial court erred in excluding even the uncontradicted portions of the participant's affidavit, any error was harmless as the remaining portions of the affidavit were duplicative of the participant's deposition testimony, which was before the trial court. *Liles v. Innerwork, Inc.*, 279 Ga. App. 352, 631 S.E.2d 408 (2006).

Striking affidavits as sanction. — The sanctions provided for in O.C.G.A. § 9-11-56(g) do not authorize the trial court to strike or disregard the affidavits presented by a party as a sanction. *Whitley v. Piedmont Hosp., Inc.*, 284 Ga. App. 649, 644 S.E.2d 514 (2007), cert. denied, 2007 Ga. LEXIS 626, 651 (Ga. 2007).

Untimely affidavits.

In a summary judgment action, while O.C.G.A. § 9-11-6(b) permitted late service of affidavits in support of a motion, in giving such permission, the trial court was not required to make a written finding of excusable neglect; accordingly, the court was not required to state its basis for finding excusable neglect. *Green v. Bd. of Dirs. of Park Cliff Unit Owners Ass'n*, 279 Ga. App. 567, 631 S.E.2d 769 (2006).

Trial court erred in granting summary judgment to a dog owner in a neighbor's malicious prosecution suit without considering the neighbor's affidavit on the basis that the affidavit was not timely filed pursuant to Ga. Unif. Super. Ct. R. 6.2. O.C.G.A. § 9-11-56(c) required a trial court to consider opposing affidavits filed any time prior to the hearing. *Woods v. Hall*, No. A11A2349, 2012 Ga. App. LEXIS 321 (Mar. 22, 2012).

Objections to affidavits, etc.

Because a family who filed suit against a driver after a collision did not object to any of the driver's affidavits supporting the driver's motion for summary judgment, the court would not entertain objections to the affidavits on appeal. *Abimbola v. Pate*, 291 Ga. App. 769, 662 S.E.2d 840 (2008).

B. Personal Knowledge

Personal knowledge held shown.

An appellee's affidavit regarding the profits of a business satisfied the personal knowledge requirement of O.C.G.A. § 9-11-56(e). The affidavit showed that the appellee was the manager of the business, that the appellee was familiar with its records and accounts, and that the appellee's statements concerning the business's financial statements were based on the appellee's personal knowledge. *Ellison v. Hill*, 288 Ga. App. 415, 654 S.E.2d 158 (2007), cert. denied, 2008 Ga. LEXIS 282 (Ga. 2008).

Bank officer's affidavit attesting to the authenticity of a line of credit agreement, note, and guaranties, confirming the occurrence of default, and setting out the outstanding indebtedness, was sufficiently made on personal knowledge despite the creditors' objections that the officer had no personal involvement in the transactions. *Windham & Windham, Inc. v. Suntrust Bank*, 313 Ga. App. 841, 723 S.E.2d 70 (2012).

C. Records and Supporting Documentation

Records should be attached to affidavit.

In a medical malpractice action, because it was undisputed that the record on appeal failed to include the medical records on which the parents' expert's conclusions were based, the parents failed to comply with O.C.G.A. § 9-11-56(e), hence, the trial court did not err when it granted summary judgment against them on this basis. *Conley v. Children's Healthcare of Atlanta, Inc.*, 279 Ga. App. 792, 632 S.E.2d 409 (2006).

D. Application

Affidavit asserting diligent service efforts insufficient. — Statements in a

plaintiff's affidavit asserting that diligent efforts were made to serve an owner prior to the order for service by publication and that the owner concealed herself to avoid service were bare conclusions that were neither supported by facts nor based on personal knowledge, and thus the affidavit was properly stricken; a statement in a process server's affidavit that, in the process server's professional opinion, the owner was intentionally evading service of the process, was also a bare conclusion, not supported by facts, about the owner's true motives and intent, and was also properly stricken. *Baxley v. Baldwin*, 279 Ga. App. 480, 631 S.E.2d 506 (2006).

Affidavit opinion as to cause of accident properly struck. — Police officer's affidavit stated that a van owner and the owner's friend chased a thief who stole the van and did not lose sight of the van, and opined that a crash between the van and two accident victims would not have occurred but for the chase. The trial court properly struck portions of the affidavit that consisted of the officer's opinions based on the officer's conversations with the van owner and were not based on physical evidence that jurors without training in accident investigation might be unable to properly evaluate, such as skid marks, distances, and the positions and damage to the vehicles. *Whitlock v. Moore*, 312 Ga. App. 777, 720 S.E.2d 194 (2011), cert. denied, 2012 Ga. LEXIS 304, 321 (Ga. 2012).

6. Medical Opinion Evidence

Absent evidence of causation in a FELA action provided by the employee's treating physician, as the doctor based a diagnosis on an incomplete medical history of the employee without considering earlier lung-related illnesses, and while unaware of the employee's prior chemical exposure and treatment by other physicians, the trial court properly granted an employer's motion for partial summary judgment on the employee's claim for benefits. *Shiver v. Ga. & Fla. Railnet, Inc.*, 287 Ga. App. 828, 652 S.E.2d 819 (2007), cert. denied, 2008 Ga. LEXIS 330 (Ga. 2008).

Application of the contradictory testimony rule was improper. — In a

medical malpractice case brought by a married couple, it was error to grant summary judgment to the defendants based on the finding that the testimony of the couple's expert was conflicting and lacking in credibility; application of the contradictory testimony rule was improper when the testimony was that of a non-party expert witness, and accordingly, notwithstanding the inconsistencies in the expert's testimony, the trial court should have given the couple the benefit of the most favorable version of such testimony as a whole which the jury would be authorized to accept. *Whitley v. Piedmont Hosp., Inc.*, 284 Ga. App. 649, 644 S.E.2d 514 (2007), cert. denied, 2007 Ga. LEXIS 626, 651 (Ga. 2007).

Construction of Evidence and Inferences

Clear and convincing evidence to support appointment of conservator.

— Similar to a ruling on a motion for summary judgment in a civil action, because a parent's gravely-impaired judgment, which combined with a physical frailty and impaired vision, made the parent vulnerable to exploitation by a new person living with the parent, the probate court properly concluded that the parent lacked sufficient understanding to make significant responsible decisions concerning the management of the parent's property; moreover, because the parent chose not to include the transcript of the evidence in the appellate record, and, as any pre-trial ruling on the parent's capabilities was, after a trial determining the matter, harmless if not moot, the probate court's ruling was upheld. *Yetman v. Walsh*, 282 Ga. App. 499, 639 S.E.2d 491 (2006).

Time and Notice for Hearing of Motion for Summary Judgment

Denial of motion for extension of time proper. — Because a motion for an extension of time to respond to a summary judgment motion and conduct additional discovery failed to set forth specific reasons why additional time was necessary and failed to include the affidavit required under O.C.G.A. § 9-11-56(f), a trial court acted within its discretion in declining to

grant the requested extension of time. *Smyrna Dev. Co. v. Whitener Ltd. P'ship*, 280 Ga. App. 788, 635 S.E.2d 173 (2006).

Notice and hearing required.

Trial court erred in granting summary judgment on an election candidate's claim for defamation by a radio broadcast, as the candidate did not have a full and fair opportunity to meet and attempt to controvert the assertions with respect to that claim. *Howard v. Pope*, 282 Ga. App. 137, 637 S.E.2d 854 (2006).

Hearing of Motion for Summary Judgment

Where timely response to motion filed, oral argument erroneously denied. — Because the responding party timely responded to a summary judgment motion, pursuant to Ga. Unif. Super. Ct. R. 6.3, the trial court erred in denying that party oral argument on said motion and in granting summary judgment to the movant. *Green v. Raw Deal, Inc.*, 290 Ga. App. 464, 659 S.E.2d 856 (2008).

Conversion of Other Motions to Motions for Summary Judgment

Conversion of motion to dismiss.

The trial court's order denying dismissal of a fraud claim in a medical malpractice action against a doctor, upon a motion which the trial court treated as one for summary judgment when it considered material beyond the pleadings, was reversed, as there was no evidence that the doctor knew or even suspected that the patient had a pancreatic tumor, or that the doctor withheld information regarding it; thus, the doctrine of equitable estoppel did not apply and the fraud claim was barred by the statute of repose, O.C.G.A. § 9-3-71(b). *Balotin v. Simpson*, 286 Ga. App. 772, 650 S.E.2d 253 (2007), cert. denied, 2007 Ga. LEXIS 803 (Ga. 2007).

When a party did not object in the trial court to the conversion of a motion to dismiss for failure to state a claim into one for summary judgment, and the party did not challenge or address the conversion on appeal, any objection to the conversion was waived. *Action Concrete v. Portrait Homes - Little Suwanee Point, LLC*, 285 Ga. App. 650, 647 S.E.2d 353 (2007).

When motions to dismiss asserted, among other things, that the complaint failed to state a claim and the trial court considered material beyond the pleadings in ruling on the motions to dismiss, those motions were required to be treated as motions for summary judgment, and the losing party maintained the right to a direct appeal from an order granting partial summary judgment. *City of Demorest v. Town of Mt. Airy*, 282 Ga. 653, 653 S.E.2d 43 (2007).

Trial court erred in failing to grant a client's request for a hearing on a former attorney's motion to dismiss claims for legal malpractice and intentional infliction of emotional distress, because the trial court considered matters outside the pleadings. Under O.C.G.A. § 9-11-12(b), the motion was required to be treated as one for summary judgment and disposed of as provided in O.C.G.A. § 9-11-56, and all parties were to be given a reasonable opportunity to present all material made pertinent to such a motion. *Fitzpatrick v. Harrison*, 300 Ga. App. 672, 686 S.E.2d 322 (2009).

Construction with Notice and Hearing Provisions of Superior Court Rules

Hearing not required in absence of request by either rule or statute. — Neither O.C.G.A. § 9-11-56(c) nor Ga. Unif. Super. Ct. R. 6.3 required that the trial court hold an oral hearing on a trustee's motion for summary judgment in the trustee's action against an executor for breach of fiduciary duty because no party requested a hearing as set forth in Rule 6.3. *Royal v. Blackwell*, 289 Ga. 473, 712 S.E.2d 815 (2011).

Service and Filing of Affidavits

Opposing affidavits.

When a party opposing summary judgment filed an affidavit and served it by mail the same day, one day before the summary judgment hearing as required by O.C.G.A. § 9-11-56(c), the affidavit was not untimely; under O.C.G.A. § 9-11-5(b), service by mail was complete upon mailing. *Kirkland v. Kirkland*, 285 Ga. App. 238, 645 S.E.2d 626 (2007), cert. denied, 2007 Ga. LEXIS 646 (Ga. 2007); 552 U.S.

1312, 128 S. Ct. 1898, 170 L.Ed.2d 749 (2008).

Failure to exercise reasonable diligence or greatest possible diligence in attempting service of process. — Because the evidence presented before the trial court failed to show that an injured passenger exercised either reasonable diligence or the greatest possible diligence in attempting service of process on an opposing driver, but instead showed that: (1) numerous attempts at service were unsuccessful; (2) the passenger filed the complaint eight days before the expiration of the limitation period, and service was not perfected until 16 months after the statute ran; (3) long lapses in time existed between failed attempts where apparently no actions were taken to effectuate service; and (4) the driver continued to reside in the same small community during the 16 months that it took to ultimately perfect service, the trial court did not err in granting summary judgment to the driver. *Moore v. Wilkerson*, 283 Ga. App. 340, 641 S.E.2d 578 (2007).

Procedure When Affidavits Unavailable

Express ruling on motion for continuance is preferred. — Better practice is for the trial court to address a motion for continuance under O.C.G.A. § 9-11-56(f) by issuing an express ruling thereon; such a ruling, of course, can be issued as part of the court's ruling on the summary judgment motion. A ruling on a pending § 9-11-56(f) motion would be especially well advised where a motion to compel discovery is also pending. *Jaraysi v. City of Marietta*, 294 Ga. App. 6, 668 S.E.2d 446 (2008).

Appealability and Finality

1. In General

Voluntary dismissal not appealable judgment.

In an action on a credit card contract brought by a creditor, the debtor's voluntary dismissal of an appeal from an order granting the creditor summary judgment before the case was ever docketed served to dismiss the debtor's direct appeal, even though the trial court did not enter a

formal dismissal order; thus, the appellate court lacked jurisdiction to hear the same, and a payment of appeal costs became moot. *Ghee v. Target Nat'l Bank*, 282 Ga. App. 28, 637 S.E.2d 742 (2006), cert. denied, 2007 Ga. LEXIS 62 (Ga. 2007), 552 U.S. 859, 128 S. Ct. 141, 169 L.Ed.2d 97 (2007).

Appeal dismissed absent evidence that exception to finality rule applied. — Because the trial court's order was best viewed as an order dismissing the plaintiffs' complaint for failure to comply with the requirements of O.C.G.A. § 9-11-17, and summary judgment could not properly be granted to a defendant on the basis of a real-party-in-interest objection, absent any evidence that an exception to the final judgment rule applied, the appeal from the trial court's order had to be dismissed. *First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc.*, 282 Ga. 883, 655 S.E.2d 605 (2008).

Appeal dismissed as untimely filed. — Motion to dismiss an appeal on grounds that the appealing party failed to timely appeal an order granting summary judgment pursuant to O.C.G.A. § 5-6-38(a) was granted; moreover, the appeal was not taken from the final judgment entered in the case. *Patterson v. Bristol Timber Co.*, 286 Ga. App. 423, 649 S.E.2d 795 (2007).

2. Grant of Summary Judgment

Judgment final only when entire case disposed of. — Because a partial taking condemnation order did not consist of a viable grant of partial summary judgment, and was not otherwise a final appealable judgment within the meaning of O.C.G.A. § 5-6-34(a), but the parties could have appealed by complying with the relevant interlocutory appeal requirements but did not do so, the appeals court lacked jurisdiction to consider either the appeal or the cross-appeal; moreover, the superior court's rulings on the admissibility of certain evidence constituted no judgment on the merits of any part of the appealing party's claim for just and adequate compensation. *Forest City Gun Club v. Chatham County*, 280 Ga. App. 219, 633 S.E.2d 623 (2006).

Court of appeals had appellate jurisdiction to review the grant of summary judgment in favor of a bank on the bank's conversion claim against a real estate firm because the grant of summary judgment was directly appealable under O.C.G.A. § 9-11-56(h), and the firm's cross-appeal of that grant of summary judgment could stand on its own merits; because the court of appeals had jurisdiction to review the grant of summary judgment in favor of the bank on the bank's conversion claim, the court also had jurisdiction pursuant to O.C.G.A. § 5-6-34(d) to review the denial of the firm's motion for summary judgment on that same issue. *Trey Inman & Assocs., P.C. v. Bank of Am., N.A.*, 306 Ga. App. 451, 702 S.E.2d 711 (2010).

3. Denial of Summary Judgment

Denial of summary judgment moot after trial of case.

After verdict and judgment, it was too late to review a judgment denying summary judgment, for that judgment became moot when the court reviewed the evidence upon the trial of the case. *Argentum Int'l, LLC v. Woods*, 280 Ga. App. 440, 634 S.E.2d 195 (2006).

Husband's complaint of the trial court's denial of the corporation's motion for summary judgment under O.C.G.A. § 9-11-56 was moot as the trial court later granted the corporation's motion for a directed verdict under O.C.G.A. § 9-11-50. *Moore v. Moore*, 281 Ga. 81, 635 S.E.2d 107 (2006).

Extent of review following trial.

Because the issue of the purported illegality of the parties' contract was not presented to the jury, the court would review the trial court's denial of the motion for summary judgment on this ground; the court would not, however, consider the defendants' argument on

summary judgment that damages were not proven, since the jury considered damages in the subsequent trial. *Smith v. Saulsbury*, 286 Ga. App. 322, 649 S.E.2d 344 (2007).

4. Certificate and Application for Review

Failure to apply for and obtain order granting appellate review.

Although the repair company did not obtain a certificate of immediate review from the trial court's order denying a renewed motion for summary judgment under O.C.G.A. § 9-11-56, the appellate court had jurisdiction to address an order denying the renewed motion for summary judgment under O.C.G.A. § 5-6-34(d); the appellate court had jurisdiction to address the trial court's order denying the company's motion for reconsideration under O.C.G.A. § 5-6-34(b), since the company had obtained a timely certificate of immediate review from the trial court's order denying its motion for reconsideration. *Gulfstream Aero. Servs. Corp. v. United States Aviation Underwriters, Inc.*, 280 Ga. App. 747, 635 S.E.2d 38 (2006).

5. Standing

Standing to appeal not present for order against another party. — Guarantor and the guarantor's principal had no standing, under O.C.G.A. § 9-11-56(h), to file a direct appeal of a trial court's grant of summary judgment to a contractor against a property owner because the guarantor and the guarantor's principal were not losing parties to the trial court's order against the owner on the contractor's breach of contract claim and because the guarantor and the guarantor's principal were not sued as joint tortfeasors of the owner. *Adams v. D-Money Enters.*, 312 Ga. App. 537, 718 S.E.2d 870 (2011).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 20A Am. Jur. Pleading and Practice Forms, Pretrial Conference and

Procedure, § 3. 23 Am. Jur. Pleading and Practice Forms, Summary Judgment, § 2.

9-11-58. Entry of judgment; judge's name to be typed, printed, or stamped after signature; filing of civil case disposition form.

Law reviews. — For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006). For annual survey

on appellate practice and procedure, see 61 Mercer L. Rev. 31 (2009).

JUDICIAL DECISIONS

Construction with O.C.G.A. §§ 9-2-60(b) and 9-11-41(e). — The trial court erroneously dismissed a litigant's petition for a writ of mandamus, and erroneously relied on dicta, in finding that orders setting a pre-trial conference in the underlying medical malpractice action were merely "housekeeping or administrative orders" that did not suspend the running of the five-year period under O.C.G.A. §§ 9-2-60(b) and 9-11-41(e). Instead, such orders tolled the running of the five-year rule if the orders were in writing, signed by the trial judge, and properly entered in the records of the trial court. *Zepp v. Brannen*, 283 Ga. 395, 658 S.E.2d 567 (2008).

Construction with Title 5. — What additional requirements are imposed by the Civil Practice Act, O.C.G.A. § 9-11-58(b), for entry of a judgment are not relevant for purposes of the Appellate Practice Act, O.C.G.A. § 5-6-38(a) and O.C.G.A. § 5-6-31, which has its own definition of when a judgment is entered. *GMC Group, Inc. v. Harsco Corp.*, 293 Ga. App. 707, 667 S.E.2d 916 (2008).

Judgment inchoate until entered.

Because a superior court's contempt finding was based upon a violation of a verbal order that had not been reduced to writing, signed by the issuing judge, and filed with the clerk, the finding was ineffective, pursuant to O.C.G.A. § 9-11-58(b), and thus, had to be reversed. *Shirley v. Abshire*, 288 Ga. App. 819, 655 S.E.2d 694 (2007).

Filing of signed judgment constitutes entry.

As a child advocate did not establish that the juvenile court directed that the court's oral order was effective on the day the order was made, the advocate's motion to reconsider was premature under

O.C.G.A. § 9-11-58(b) because the order was filed before the juvenile court filed a written order. In *the Interest of N. W.*, 309 Ga. App. 617, 710 S.E.2d 832 (2011).

Intent to record previously unrecorded action actually taken or judgment actually rendered. — Juvenile court had jurisdiction to award custody of a child to the Department of Human Resources and properly entered its order of disposition awarding permanent custody to the Department because the mother and father had no rights to surrender to the great-grandparents when the termination order reflected the juvenile court's intent to record a previously unrecorded action actually taken or judgment actually rendered; the juvenile court rendered judgment terminating the child's parental rights at the conclusion of the hearing on September 3, 2008, and although its oral ruling was not memorialized in a written order until September 9, 2008 and not filed until September 17, 2008, such order clearly stated that it was nunc pro tunc to September 3, 2008, the date of the termination hearing. In *re D.C.H.*, 300 Ga. App. 827, 686 S.E.2d 434 (2009).

Contempt based on oral judgment improper. — To the extent that a later contempt finding was based on the trial court's oral pronouncement, it was a nullity. In *re Tidwell*, 279 Ga. App. 734, 632 S.E.2d 690 (2006).

Debtor failed to show rights were violated by order confirming sale. — Debtor sought to nullify the confirmation of the foreclosure sale by invoking the rule that a judgment must be in writing, signed by the judge, and filed with the clerk in accordance with O.C.G.A. § 9-11-58 to be effective, irrespective of any oral announcement by the trial court. The superior court at the second confirma-

tion hearing correctly determined that, while a final order should be entered “to close [the first] case out,” the confirmation proceedings in connection with the foreclosure sale nevertheless comprised “a new action”, and with respect to such proceedings, the superior court signed a final order and duly filed it with the clerk; thus, the debtor’s rights were not violated. *Friedman v. Regions Bank*, 288 Ga. App. 57, 653 S.E.2d 507 (2007).

When an appellant filed a bankruptcy petition after a temporary restraining order was issued verbally but before it was reduced to writing, signed, and filed, it was error to hold the appellant in civil contempt, as under O.C.G.A. § 9-11-58, the order was not effective until it was written, signed, and filed. *Huffman v. Armenia*, 284 Ga. App. 822, 645 S.E.2d 23 (2007), cert. denied, 2007 Ga. LEXIS 554 (Ga. 2007).

Time for filing motion for attorney fees not impacted by civil disposition form filing. — As real property contestants failed to file a request for attorney fees pursuant to O.C.G.A. § 9-15-14 within 45 days following a trial court’s final disposition in a real property proceeding, the trial court erred in granting the contestants’ request because the court lacked jurisdiction to consider the motion; the time for filing the motion began to run when judgment was entered under O.C.G.A. § 5-6-31, and the time when a civil disposition form was filed under O.C.G.A. § 9-11-58(b) had no effect on the timing for purposes of the motion. *Horesh v. DeKinder*, 295 Ga. App. 826, 673 S.E.2d 311 (2009).

Cited in *W. Ray Camp, Inc. v. Cavalry Portfolio Servs., LLC*, 308 Ga. App. 597, 708 S.E.2d 560 (2011).

9-11-60. Relief from judgments.

Law reviews. — For annual survey of Administrative Law, see 57 *Mercer L. Rev.* 1 (2005). For survey article on workers’ compensation law, see 59 *Mercer L. Rev.* 463 (2007). For annual survey of law on

insurance, see 62 *Mercer L. Rev.* 139 (2010). For article, “Appellate Practice and Procedure,” see 63 *Mercer L. Rev.* 67 (2011).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- POWER OF COURT OVER JUDGMENTS, GENERALLY
- COLLATERAL ATTACK
- MOTION FOR NEW TRIAL
- MOTION TO SET ASIDE
- TIME OF RELIEF
- CORRECTION OF CLERICAL MISTAKES
- LAW OF THE CASE RULE

General Consideration

Federal Arbitration Act. — It was error to refuse to enforce a foreign judgment against a company that was based on an arbitration award. The company had not sought to vacate the arbitration award within the three-month period allowed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq., and the company could not circumvent this limitation period by raising a claim under O.C.G.A. § 9-11-60.

McDonald v. H & S Homes, LLC, 290 Ga. App. 103, 658 S.E.2d 901 (2008).

Husband did not waive right to jury trial. — Trial court abused its discretion in denying a husband’s motion for a new trial and to set aside the decree of divorce, as the husband’s actions in showing up 45 minutes late in answering a calendar call did not amount to either an expressed or implied waiver of an asserted right to a jury trial, and the husband did not expressly consent to a bench trial. *Walker v.*

Walker, 280 Ga. 696, 631 S.E.2d 697 (2006).

Postjudgment attack on forfeiture.

Surety sued a city after the cash bond the surety posted was forfeited. The suit was properly dismissed based on sovereign immunity; if the bond forfeiture was improper, under O.C.G.A. § 9-11-60(d), the surety's remedy lay not in a suit against the city, but in a motion in the traffic court to set aside the forfeiture. *Watts v. City of Dillard*, 294 Ga. App. 861, 670 S.E.2d 442 (2008).

Prior decision binding precedent.

— If a corporation was able to prove a breach of a consent judgment by the corporation's previous owner, the corporation could not show actual damages and was limited to recovering nominal damages because the corporation's claim was foreclosed by a previous decision of the court of appeals; that case was binding precedent and established that regardless of the owner's proof of claim, a sale of a motel would not have occurred, precluding the corporation's recovery of actual damages on the corporation's breach of contract claim. *Duke Galish, LLC v. Manton*, 308 Ga. App. 316, 707 S.E.2d 555 (2011).

Dismissal of appeal based on lack of appellate jurisdiction. — Because an

appeal by the parents from the juvenile court's order denying their motion to rescind and re-enter the dismissal order under O.C.G.A. § 9-11-60(g) on the grounds that the trial court failed to give proper notice of its decision, in accordance with O.C.G.A. § 15-6-21(c), failed to challenge the juvenile court's error in denying the motion, but rather, challenged specific rulings entered by the juvenile court in the deprivation proceedings, denial of the motion to rescind and re-enter was affirmed on appeal, as the appellate court lacked jurisdiction to consider the errors asserted by the parents in the underlying deprivation case. In the *Interest of S.C.*, 283 Ga. App. 387, 641 S.E.2d 618 (2007).

Failure to prove damages nonamendable defect. — Trial court erred in entering a default judgment in the amount of \$15,000 against a home inspector because a purchaser's damages were unliquidated, and other than the prayer in the purchaser's complaint for

\$15,000, the purchaser made no showing of the amount of damages; the purchaser's failure to prove the purchaser's damages constituted a nonamendable defect within the meaning of the Georgia Civil Practice Act under O.C.G.A. § 9-11-60(d)(3). *Strickland v. Leake*, 311 Ga. App. 298, 715 S.E.2d 676 (2011).

Cited in *Lewis v. Waller*, 282 Ga. App. 8, 637 S.E.2d 505 (2006); *Rouse v. Arrington*, 283 Ga. App. 204, 641 S.E.2d 214 (2007); *In re Estate of Brice*, 288 Ga. App. 449, 654 S.E.2d 420 (2007); *Ervin v. Turner*, 291 Ga. App. 719, 662 S.E.2d 721 (2008); *In re Estate of Zeigler*, 295 Ga. App. 156, 671 S.E.2d 218 (2008); *Davis v. State*, 285 Ga. 343, 676 S.E.2d 215 (2009); *Perkins v. State*, 300 Ga. App. 464, 685 S.E.2d 300 (2009); *Belans v. Bank of Am., N.A.*, 309 Ga. App. 208, 709 S.E.2d 853 (2011); *Clay v. State*, No. S11A1956, 2012 Ga. LEXIS 301 (Mar. 19, 2012).

**Power of Court over Judgments,
Generally**

Judgments and decrees in breast of court during term of entry.

A contractor's motion for reconsideration was an improper attempt to attack the trial court's judgment outside the term of court without setting forth a basis under O.C.G.A. § 9-11-60(d); because the trial court's term had expired before the filing of the motion for reconsideration, the judgment was no longer within the breast of the trial court and could not be set aside or altered. *J. Kinson Cook of Ga., Inc. v. Heery/Mitchell*, 284 Ga. App. 552, 644 S.E.2d 440 (2007).

Excusable neglect. — Because a dental patient's expert affidavit pursuant to O.C.G.A. § 9-11-9.1 was not based on certified or sworn records, nor was it based on the personal knowledge of the expert, the trial court erred in denying the dentist's motion for summary judgment in the patient's dental malpractice action; although the records custodian had failed to properly provide certified copies of the records upon the patient's discovery request, the patient waived the right to present such evidence pursuant to Ga. Unif. Super. Ct. R. 6.2 where the patient did not file a timely response to the dentist's summary judgment with an

O.C.G.A. § 9-11-56(f) affidavit, and the patient did not show excusable neglect for purposes of O.C.G.A. § 9-11-60(b). *Rudd v. Paden*, 279 Ga. App. 141, 630 S.E.2d 648 (2006).

Hearing required because error not clear on face of judgment. — Because the facts presented did not create a circumstance where the parties knew what order the trial court intended, and it was not obvious what the correct judgment should have been, the order entered could not have been corrected without an opportunity for the parties to be heard on this issue. *Rouse v. Arrington*, 283 Ga. App. 204, 641 S.E.2d 214 (2007).

A court has inherent power to modify its own judgment, etc.

Because the superior court modified the court's judgment so as to vacate the court's order of dismissal and provide only for the entry of a default judgment, the issue of dismissal was moot and provided no basis for setting aside the judgment. But, because the court, absent amendment to the demand for judgment or argument supporting the judgment, awarded damages in excess of the amount claimed, that award had to be reversed. *Stamps v. Nelson*, 290 Ga. App. 277, 659 S.E.2d 697 (2008).

No power over judgment once appeal taken.

Habeas court lacked jurisdiction to amend its original order during the pendency of an appeal from said order, as the filing of the notice of appeal operated as a supersedeas and deprived the trial court of the power to affect the judgment appealed. *Upton v. Jones*, 280 Ga. 895, 635 S.E.2d 112 (2006).

Court of appeals erred in reversing the trial court's grant of partial summary judgment in favor of a county because the trial court did not have authority to enter the court's order purporting to make the grant of partial summary judgment final under O.C.G.A. § 9-11-54(b) since by the arrestee's first notice of appeal, an arrestee put the machinery of appellate review into motion under O.C.G.A. § 9-11-54(h) and committed a procedural default; accordingly, the arrestee was foreclosed from resubmitting the matter for review on appeal of the final judgment,

and because the first direct appeal was dismissed, that dismissal was binding upon the trial court under O.C.G.A. § 9-11-60(h). *Houston County v. Harrell*, 287 Ga. 162, 695 S.E.2d 29 (2010).

Collateral Attack

Judgment is "void on its face", etc.

In a suit for damages arising from a motor vehicle accident, a trial court erred by failing to set aside a default judgment entered against a transport corporation for its failure to file an answer to an amended complaint as no order from the trial court required it to answer. As a result, the default judgment was improper since it created a nonamendable defect. *Hiner Transp., Inc. v. Jeter*, 293 Ga. App. 704, 667 S.E.2d 919 (2008).

Judgment regular on its face not subject to collateral attack.

Where a citizen failed to show that the judgment in the citizen's first case lacked either personal or subject matter jurisdiction, the citizen failed to show that it was void; because the original order was not appealed, the citizen was not permitted to relitigate that same issue in a later action. *Nally v. Bartow County Grand Jurors*, 280 Ga. 790, 633 S.E.2d 337 (2006).

The trial court properly dismissed a business' contribution action, filed pursuant to O.C.G.A. § 51-12-32, on subject matter jurisdiction grounds, as: (1) its finding that the business was the sole tortfeasor barred the action; (2) that finding was not void; (3) no appeal was taken from that finding; and (4) the suit amounted to an improper collateral attack on the default judgment entered against the business. *State Auto Mut. Ins. Co. v. Relocation & Corporate Hous. Servs.*, 287 Ga. App. 575, 651 S.E.2d 829 (2007), cert. denied, 2008 Ga. LEXIS 163 (Ga. 2008).

A third person not a party cannot go into court, etc.

When the owners of a corporation sued waived a forum selection clause, they also waived the defenses of personal jurisdiction and venue by failing to raise them at the earliest opportunity; thus, as non-parties to the underlying case, the owners could not otherwise appeal the default judgment against the corporation. *Rice v. Champion Bldgs., Inc.*, 288 Ga.

App. 597, 654 S.E.2d 390 (2007), cert. denied, 2008 Ga. LEXIS 326 (Ga. 2008).

Motion for New Trial

Proper venue required. — In an action which represented the tenth time a litigant had made the same argument that summary disposition of a prior state court case deprived the litigant of the federal Seventh Amendment right to a jury trial, a motion for a new trial was properly dismissed, given that: (1) the claims therein had been previously addressed and rejected; (2) Ga. Const. 1983, Art. I, Sec. I, Para. XII was a right of choice provision, not a right of access provision; and (3) the motion was both untimely under O.C.G.A. § 5-5-40(a), and filed in the wrong county court, in violation of O.C.G.A. § 9-11-60(b). *Crane v. Poteat*, 282 Ga. App. 182, 638 S.E.2d 335 (2006), cert. denied, 2007 Ga. LEXIS 54 (Ga. 2007); cert. dismissed, 551 U.S. 1101, 127 S. Ct. 2912, 168 L. Ed. 2d 241 (2007).

Exclusion of evidence. — General partners' motion for a new trial was properly denied as evidence of the limited partners' attempts to liquidate their interests in the partnership was properly excluded as evidence of settlement negotiations. *Kellett v. Kumar*, 281 Ga. App. 120, 635 S.E.2d 310 (2006).

Evidence properly admitted. — General partners' (GPs') motion for a new trial was properly denied as evidence of a GP's involvement in a prior suit was properly admitted to show a course of conduct because the prior suit also involved a breach of a partnership agreement, a breach of fiduciary duty, a nursing home, and accusations that the GP violated the plain language of the partnership agreement by failing to pay the limited partners their preferred returns. *Kellett v. Kumar*, 281 Ga. App. 120, 635 S.E.2d 310 (2006).

Juror misconduct. — General partners' (GPs') motion for a new trial was properly denied as the juror affidavits filed by the GPs outlining alleged juror misconduct constituted an attempt to impeach the jury's verdict in the exact manner prohibited by O.C.G.A. § 9-10-9. *Kellett v. Kumar*, 281 Ga. App. 120, 635 S.E.2d 310 (2006).

Court erred in failing to hold hearing on motion. — Trial court erred in denying hotel owner's motion for new trial without holding the hearing mandated by Ga. Unif. Super. Ct. R. 6.3; while the motion reiterated arguments made in the owner's unsuccessful motion to set aside a default judgment, the motion also argued that evidentiary errors occurred during the trial on damages and that the award was excessive, and thus sought a reexamination of issues of fact. *PHF II Buckhead LLC v. Dinku*, No. A11A2033, 2012 Ga. App. LEXIS 325 (Mar. 22, 2012).

Motion to Set Aside

Based on notice under O.C.G.A. § 15-6-21(c).

Trial court properly set aside the dismissal of a declaratory judgment action brought by putative heirs against two trustees of an estate as the trial court failed to provide notice of a peremptory calendar call the case was placed on, which led to the dismissal, therefore, the trial court had the authority to correct the error. *Andrus v. Andrus*, 290 Ga. App. 394, 659 S.E.2d 793 (2008).

Construction with O.C.G.A. § 5-6-34. — Wife's appeal of a judgment granting a husband's motion under O.C.G.A. § 9-11-60(d)(2) to set aside an order awarding the wife sole legal and physical custody of the parties' children, eliminating the husband's right of visitation, and increasing the husband's child support obligations was a "custody case" subject to direct appeal pursuant to O.C.G.A. § 5-6-34(a)(11); the grant of a motion to set aside in a child custody case is directly appealable, and an action seeking to change visitation qualifies for treatment as a "child custody case". *Edge v. Edge*, 290 Ga. 551, 722 S.E.2d 749 (2012).

Court of appeals was unable to determine whether the trial court's denial of a driver's motion under O.C.G.A. § 9-11-60(g) to set aside an order dismissing a lawsuit was proper because the trial court made no findings of fact about whether the court sent the notice of the order of dismissal to the driver as required by O.C.G.A. § 15-6-21(c); the driver submitted affidavits in which members and employees of the driver's law

firm attested that the firm did not receive notice of the order of dismissal, which also was some evidence that notice was not sent. *Tyliczka v. Chance*, 313 Ga. App. 787, 723 S.E.2d 27 (2012).

Construction with Code Section 5-6-35.

Although the denial of a motion to set aside a judgment was ordinarily subject to the discretionary appeal procedure, O.C.G.A. § 5-6-35(a)(8), the denial of a stepson's motion to set aside was reviewable in conjunction with the stepson's appeal from the superior court's judgment reviewing the probate court's decision because the superior court's judgment reviewing the probate court's decision was directly appealable under O.C.G.A. § 5-6-34(a)(1). *Bocker v. Crisp*, 313 Ga. App. 585, 722 S.E.2d 186 (2012).

Construction with O.C.G.A. § 34-9-106. — In a worker's compensation action, because an employer's motion to set aside an award in favor of its injured employee focused exclusively on issues that it could have had corrected in a direct appeal to the Workers' Compensation Board, or in the hearing before the administrative law judge, the superior court did not abuse its discretion in denying said motion. *Winnersville Roofing Co. v. Coddington*, 283 Ga. App. 95, 640 S.E.2d 680 (2006).

Construction with O.C.G.A. § 15-6-21. — Because the trial court failed to make an explicit finding of wilfulness in its order dismissing the plaintiff's case for failure to comply with an order compelling discovery, dismissal was reversed, and the case was remanded for a hearing on the issue; as a result, the appeals court declined to consider an argument that the plaintiff's counsel did not receive notice of the order compelling discovery, pursuant to O.C.G.A. § 15-6-21(c), as any remedy for an alleged lack of notice was to pursue a motion to set aside pursuant to O.C.G.A. § 9-11-60(d)(2). *Rouse v. Arrington*, 283 Ga. App. 204, 641 S.E.2d 214 (2007).

Construction with O.C.G.A. § 14-11-304. — The trial court did not abuse the court's discretion in denying a motion to set aside a consent judgment entered against a debtor, a limited liabil-

ity company, as the fact that the company's sole member did not receive notice of the complaint or approve the consent judgment was insufficient to warrant that relief as the member was considered a separate legal entity from the company. *Old Nat'l Villages, LLC v. Lenox Pines, LLC*, 290 Ga. App. 517, 659 S.E.2d 891 (2008).

Claim was unauthorized as basis and was outside time limit. — In an action by a client against the client's former attorney, the client's claims that an order was invalid because the order was unreasonable, unlawful, ambiguous, or against public policy, or because the order resulted from the attorney's fraud or other wrongful acts, were either unauthorized as a basis for setting aside the judgment under O.C.G.A. § 9-11-60(d) or were raised outside of the three-year time limit of § 9-11-60(f). *Hook v. Bergen*, 286 Ga. App. 258, 649 S.E.2d 313 (2007), cert. denied, 2007 Ga. LEXIS 697 (Ga. 2007).

Stay pending arbitration. — In an action between a contractor and a landowner alleging a breach of contract and other related claims in which disputes arising under the parties' contract were required to be submitted to arbitration, the superior court erred in entering a default judgment against the landowner, and in denying relief from the same, ignoring a stay pending arbitration, as the issues involved in the litigation were ones that fell under the parties' agreement. *GF/Legacy Dallas, Inc. v. Juneau Constr. Co., LLC*, 282 Ga. App. 14, 637 S.E.2d 511 (2006), cert. denied, 2007 Ga. LEXIS 157 (Ga. 2007).

Judgment not set aside before case transferred to superior court. — Because a tenant's motion to set aside a default judgment in a dispossessory action was not granted, the default judgment stood as a final order, and the magistrate court's attempt to transfer the case to superior court by agreement of the parties was improper. *Abushmais v. Erby*, 282 Ga. 619, 652 S.E.2d 549 (2007).

Uniform Enforcement of Foreign Judgments Law.

Appeal of an order denying appellants' motion to vacate a foreign judgment was dismissed because appellants failed to fol-

low the correct procedure for appealing the trial court's decision; appellants never filed a motion to set aside the judgment under O.C.G.A. § 9-11-60(d), which was the proper method for attacking a foreign judgment filed under the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq.; the underlying subject matter of appellants' motions was an attempt to set aside a judgment, and the denial of appellants' motions was subject to discretionary appeal because the underlying subject matter generally controlled over the relief sought in determining the proper procedure to follow to appeal. *Noaha, LLC v. Vista Antiques & Persian Rugs, Inc.*, 306 Ga. App. 323, 702 S.E.2d 660 (2010).

Because a trial court was required by O.C.G.A. §§ 9-11-60 and 9-12-132 to accord a foreign judgment full faith and credit if the judgment was proper under the law in which the judgment was rendered, the court erred in holding that Georgia law governed the filing of the debtors' answer in a New York case; the trial erred in granting a motion to set aside the judgment since the debtors were in default for failing to timely serve an answer upon counsel in accordance with N.Y. C.P.L.R. 320(a), 2103(b). *LeRoy Vill. Green Residential Health Care Facility, Inc. v. Downs*, 310 Ga. App. 754, 713 S.E.2d 728 (2011).

Setting aside judgment on ground of mistake in workers' compensation action. — Superior court abused the court's discretion in denying a city's motion to set aside a judgment granting a police officer's demand for judgment on the Workers' Compensation Board's award because the city was authorized to move to set aside the judgment on the ground of mistake under O.C.G.A. § 9-11-60(d)(2), and in the city's first opportunity to submit factual support for the city's argument regarding mistake, the city provided un rebutted evidence that a second stipulation and agreement the officer signed was entirely the product of a mistake; the failure of the city's effort to appeal the award to the superior court on the second stipulation and agreement was entirely the fault of the superior court because the superior court failed to issue a

timely order on the city's initial appeal to that court, which resulted in an affirmance by operation of law of the Board's award. *City of Atlanta v. Holder*, 309 Ga. App. 811, 711 S.E.2d 332 (2011).

Superior court abused the court's discretion in denying a city's motion to set aside a judgment granting a police officer's demand for judgment on the Workers' Compensation Board's award because any earlier trial court orders were subject to a proper motion to set aside pursuant to O.C.G.A. § 9-12-40. *City of Atlanta v. Holder*, 309 Ga. App. 811, 711 S.E.2d 332 (2011).

Challenge to residency assertion in divorce case was challenge to court's jurisdiction. — In a divorce case, a husband's enumerations of error raising the issue of the wife's residency under O.C.G.A. § 19-5-5(b)(2) were challenges to the trial court's jurisdiction over the subject matter; these related to a motion to set aside under O.C.G.A. § 9-11-60(d)(1). *Kuriatnyk v. Kuriatnyk*, 286 Ga. 589, 690 S.E.2d 397 (2010).

Motion to set aside must be based, etc.

Since the defendant established the presence of a nonamendable defect on the face of the record, the trial court erred in denying the motion to set aside a default judgment which was based on the defendant's failure to answer an amended complaint. *Shields v. Gish*, 280 Ga. 556, 629 S.E.2d 244 (2006).

Although a spouse alleged on appeal that a motion to set aside that portion of the divorce decree which dealt with the issue of child support, which incorporated the parties' settlement agreement, was properly granted because the decree failed to set forth a specific baseline dollar amount for child support, as required by O.C.G.A. § 19-5-12, the decree contained stated dollar amounts which could be considered baseline payments; hence, pursuant to O.C.G.A. § 19-6-15 as applicable at the time, the trial court properly found that the spouse was liable for paying child support for two children in the range of 23 to 28 percent of the spouse's gross income. *Scott v. Scott*, 282 Ga. 36, 644 S.E.2d 842 (2007).

Claims based on decisional or judgmental error not cognizable. — Inas-

much as the party seeking to set aside a judgment of dismissal directed the party's claims of mistake to decisional or judgmental error underlying the trial court's judgment of dismissal, such claims were not cognizable under O.C.G.A. § 9-11-60(d)(2). *Brown v. Gadson*, 288 Ga. App. 323, 654 S.E.2d 179 (2007), cert. denied, 2008 Ga. LEXIS 236 (Ga. 2008).

In a divorce action, etc.

Husband's application to vacate an arbitration award under O.C.G.A. § 9-9-13 should have been dismissed rather than denied since the trial court's divorce decree in which it approved the arbitration award was final on the date that it issued the decree even though the arbitration award had, in fact, not been issued on that date; thus, the husband should have filed an application for a discretionary appeal from the trial court's final judgment within 30 days of the entry of the judgment and decree under O.C.G.A. § 5-6-35(d) or filed a motion to set aside the judgment and decree under O.C.G.A. § 9-11-60. Since, pursuant to O.C.G.A. § 9-9-15 the order confirming the arbitration award became the judgment of the trial court on the date that the trial court issued its divorce decree, all matters in litigation in the action were final on that date, including those submitted for arbitration, and the later purported arbitration award was of no effect. *Ciraldo v. Ciraldo*, 280 Ga. 602, 631 S.E.2d 640 (2006).

Upon reading the rules within the Civil Practice Act in *para materia* with Ga. Unif. Super. Ct. R. 24.6(B), the trial court was authorized to grant a divorce well after 30 days from the time an answer would have been due; hence, the trial court did not err in denying a wife's motion to set said judgment aside. *Hammack v. Hammack*, 281 Ga. 202, 635 S.E.2d 752 (2006).

Trial court erred in granting a husband's motion to set aside an order awarding a wife sole legal and physical custody of the parties' children, eliminating the husband's right of visitation, and increasing the husband's child support obligations because the husband did not provide the trial court with an appropriate basis to set aside the court's final order pursu-

ant to O.C.G.A. § 9-11-60(d)(2); to establish mistake, the husband could not rely on the mistake of trial counsel as if counsel were acting adversely to the husband, rather than as his representative before the trial court because trial counsel's failure to include a correct address for the husband on a motion to withdraw was an insufficient ground to set aside the case under O.C.G.A. § 9-11-60(d)(2). *Edge v. Edge*, 290 Ga. 551, 722 S.E.2d 749 (2012).

Irregularities not on face of record.

Despite the fact that a spouse might have been negligent for not attacking the divorce decree by direct appeal, when that spouse failed to show a non-amenable defect on the face of the record, the trial court erred in granting a O.C.G.A. § 9-11-60(d)(3) motion to set the decree aside as to the issue of child support. *Scott v. Scott*, 282 Ga. 36, 644 S.E.2d 842 (2007).

Gross neglect during discovery supported denial of motion to set aside default judgment. — Because a lessee's conduct during the discovery stage of the proceedings below on the lessor's breach-of-lease complaint clearly demonstrated gross neglect, specifically, the lessee's failure to: (1) respond to a motion to compel and attend the hearing thereon; (2) communicate with counsel; and (3) attack the default judgment until eight months after it was entered, the trial court manifestly abused its discretion in granting the lessee's motion to set the default aside. *Kairos Peachtree Assocs., LLC v. Papadopoulos*, 288 Ga. App. 161, 653 S.E.2d 386 (2007).

Failure to appear not a meritorious reason.

Superior court did not abuse the court's discretion in denying a stepson's motion under O.C.G.A. § 9-11-60(d) to set aside a judgment entered in favor of an administrator based on the claim that the stepson's attorney had no notice of the trial date because the superior court placed the case on the trial calendar upon the stepson's request; therefore, pursuant to O.C.G.A. § 9-11-40(c)(2), the superior court was not required to provide the stepson with notice of the trial date, and the stepson's attorney had a duty to attend court and look after the attorney's and the stepson's interests. *Bocker v.*

Crisp, 313 Ga. App. 585, 722 S.E.2d 186 (2012).

Lack of notice as nonamendable defect.

Trial court abused the court's discretion in denying an O.C.G.A. § 9-11-60(d) motion to set aside a default judgment entered when a builder failed to appear for trial in a breach of contract action; a nonamendable defect was shown on the face of the record, which established that the builder had never received actual notice of the trial as the notice was sent to the wrong address and was returned. *Moore v. Davidson*, 292 Ga. App. 57, 663 S.E.2d 766 (2008).

Defendant's failure to attend not justification for setting aside judgment.

Denial of motion to set aside a default judgment against a corporation was not an abuse of discretion as the corporation's counsel admitted that the counsel failed to appear for trial because the counsel did not read the legal newspaper in which the trial calendar was published; the corporation offered no legal excuse for its failure to appear at the trial calendar. *Migmar, Inc. v. Williams*, 281 Ga. App. 870, 637 S.E.2d 471 (2006).

Lack of jurisdiction of the person when garnishment summons defective. — Trial court erred in denying an employer's motion to set aside a default judgment under O.C.G.A. § 9-11-60(d)(1) because the court was without jurisdiction of the employer's person since the garnishment summons a bank caused to be served against the employer was defective; the summons did not substantially comply with the requirement of O.C.G.A. § 18-4-113(a) that the summons be directed to the garnishee because the summons was directed to a corporation that was legally separate and distinct from the employer's paint and body shop. *Lewis v. Capital Bank*, 311 Ga. App. 795, 717 S.E.2d 481 (2011).

Garnishment proceedings. — Because a default judgment can be entered pursuant to O.C.G.A. § 18-4-115(a) only when the garnishee fails to timely file an answer, and by the plain terms of O.C.G.A. § 18-4-113(a)(1), the time in which an answer must be filed is triggered

by the service of a summons of continuing garnishment, a default judgment is entered as provided in O.C.G.A. § 18-4-115(a) only after the garnishee has been served with proper process or has waived service of process, and O.C.G.A. § 18-4-115(b) provides relief, therefore, only when process has been served or waived; when a court enters a default judgment in a continuing garnishment proceeding in which the garnishee has not been served with a summons of continuing garnishment and the court has not obtained jurisdiction of the person of the garnishee, the default judgment is not one entered as provided in O.C.G.A. § 18-4-115(a), and O.C.G.A. § 18-4-115(b) affords no relief, and in such a case, the garnishee is entitled to bring a motion to set aside the default judgment under O.C.G.A. § 9-11-60(d)(1). *Lewis v. Capital Bank*, 311 Ga. App. 795, 717 S.E.2d 481 (2011).

Appeal from denial of motion.

Denial of motion to set aside a default judgment against a corporation was affirmed as: (1) there was no pending motion in the record when the default judgment was entered since the corporation's summary judgment motion had been denied as premature; (2) a colloquy between the trial court and the corporation's counsel did not create a pending motion; and (3) the fact that the corporation was entitled to resubmit its summary judgment motion did not mean that a motion was pending. *Migmar, Inc. v. Williams*, 281 Ga. App. 870, 637 S.E.2d 471 (2006).

Denial of motion to set aside a default judgment against a corporation was not an abuse of discretion as the trial was properly noticed by publication of the trial calendar in the county's legal gazette; publication of a court calendar in the county's legal organ of record was sufficient notice to the parties to appear. *Migmar, Inc. v. Williams*, 281 Ga. App. 870, 637 S.E.2d 471 (2006).

Because defendant effectively waived defenses of a lack of both personal jurisdiction and venue in failing to appear at the trial, trial court did not abuse the court's discretion in striking defendant's answer and denying a motion to set aside the default judgment entered. *Jacques v.*

Murray, 290 Ga. App. 334, 659 S.E.2d 643 (2008).

Partition action. — Trial court did not err when the court denied a mother's motion to set aside a judgment of partition because the motion to set aside was filed more than three years after the entry of the judgment of partition, and that judgment was made by a court with jurisdiction; the trial court had subject-matter jurisdiction to enter the partitioning judgment since the land sought to be partitioned was partially located in the county of the trial court, and that court had personal jurisdiction of the mother since, under the partitioning statutes, the notice of intent to seek partitioning was the only process necessary to bring a defendant into court to meet the application for partitioning. *Cabrel v. Lum*, 289 Ga. 233, 710 S.E.2d 810 (2011).

Time of Relief

Untimely motion did not afford relief. — The trial court properly denied a motion to correct a judgment entered against two debtors and their guarantors, five years and eight months after the expiration of the term of court in which the judgment was entered, as they failed to show any entitlement to relief or exception as to why they could not have timely sought the relief requested; moreover, while a judgment which was void for lack of jurisdiction could be attacked at any time, all other motions to set aside a judgment had to be brought within three years after the judgment was entered, pursuant to O.C.G.A. § 9-11-60(f). *De La Reza v. Osprey Capital, LLC*, 287 Ga. App. 196, 651 S.E.2d 97 (2007), cert. denied, 2007 Ga. LEXIS 819 (Ga. 2007).

Motion filed out of term in which judgment issued. — In a dispute involving new and former owners of a daycare center, the trial court was without authority to grant the new owners' motion for reconsideration of the dismissal of their motion to set aside a default judgment. The motion for reconsideration was filed and granted four terms after the judgment at issue; thus, the order granting the motion for reconsideration was void. *Levin Co. v. Walker*, 289 Ga. App. 299, 656

S.E.2d 588 (2008), cert. denied, 2008 Ga. LEXIS 399 (Ga. 2008).

Seller could not circumvent time period. — Because a collateral attack of an Alabama arbitration award was untimely for purposes of 9 U.S.C. § 12, which outlined a three-month statute of limitations to challenge such an award based on fraud, corruption, or partiality of the arbitrator, and a home seller's motion under O.C.G.A. § 9-11-60(d) did not afford the seller an avenue to circumvent this time period, the trial court erred in denying a home buyer's petition to domesticate the award. *McDonald v. H & S Homes, LLC*, 290 Ga. App. 103, 658 S.E.2d 901 (2008).

Correction of Clerical Mistakes

Court authorized to correct clerical mistakes at any time.

Probate court violated O.C.G.A. § 15-6-21(c)'s notice requirements by setting aside a partial final consent order sua sponte without notice to the parties' counsel. If the intent of the final order the court later entered was to supplement and not supplant the partial final order, O.C.G.A. § 9-11-60(g) allowed the fact-finder to correct "at any time" the mistaken omission of the partial final order's provision concerning appointment of an executor from the final order. *Harwell v. Harwell*, 292 Ga. App. 339, 665 S.E.2d 33 (2008).

Dismissal with prejudice could be corrected to dismissal without prejudice. — Trial court erred in denying the plaintiffs' motion under O.C.G.A. § 9-11-60(g) to withdraw their dismissal with prejudice and submit a dismissal without prejudice. The plaintiffs' counsel and the defendant driver's counsel submitted affidavits that they had intended the dismissal to be without prejudice and had filed the dismissal with prejudice in error; § 9-11-60(g) allowed the correction of errors arising from oversight or omission, and the plaintiffs' UM insurer was not prejudiced by this mistake. *Mullinax v. State Farm Mut. Auto. Ins. Co.*, 303 Ga. App. 76, 692 S.E.2d 734 (2010).

Vacation and reentry of judgment for appeal purposes when losing

party not timely notified of decision.

In a workers' compensation case, when the trial court did not send the parties its judgment as required by O.C.G.A. § 15-6-21(c), it erred in denying the employer's motion under O.C.G.A. § 9-11-60(g) to vacate and re-enter the judgment so that the employer could file a timely appeal; O.C.G.A. § 34-9-105(b) did not prevent granting of the motion because the trial court had complied with its time limitations, and it was improper for the trial court to decide the motion based upon its determination that the employer knew or should have known that a judgment had been entered. *Wal-Mart Stores, Inc. v. Parker*, 283 Ga. App. 708, 642 S.E.2d 387 (2007).

Trial court did not abuse the court's discretion in setting aside a default judgment entered in favor of former police officers under O.C.G.A. § 9-11-60(d) because the default judgment was entered despite the fact that the record disclosed that a pension fund board of trustees timely answered the complaint and, thus, there was no basis upon which to claim a default judgment; the board's answer was filed 31 days after service, but because that day was a Monday and the 30th day after service fell on a Sunday, under O.C.G.A. § 1-3-1(d)(3), the answer was timely. *Stamey v. Policemen's Pension Fund Bd. of Trs.*, 289 Ga. 503, 712 S.E.2d 825 (2011).

No clerical errors found.

Trial court erred by entering a second final decree of divorce pursuant to O.C.G.A. § 9-11-60(g) after the term of court in which the first final decree had been entered had already expired because there were no clerical mistakes made with respect to the first final decree; the alleged mistake by the clerk, if any, related to the clerk's failure to file the husband's premature motion for new trial and had nothing to do with any alleged clerical errors in the first order and, accordingly, the trial court could not "correct" any mistake relating to the handling of the husband's motion for new trial by issuing a "corrected" second order based on a first order that contained no clerical mistakes. *Tremble v. Tremble*, 288 Ga. 666, 706 S.E.2d 453 (2011).

Law of the Case Rule**Law of the case rule abolished.**

Trial court was not bound by an order in which it previously found that it lacked jurisdiction over a dispute between neighbors, as the law of the case doctrine had been abolished pursuant to O.C.G.A. § 9-11-60(h). *Knapp v. Cross*, 279 Ga. App. 632, 632 S.E.2d 157 (2006).

Under O.C.G.A. § 9-11-60(h), the law of the case had been abolished and did not bind the trial court to the court's interim ruling ordering the wife of a mortgagor to pay rent into the registry of the court pursuant to O.C.G.A. § 44-7-54(a)(1) during a continuance of the lender's dispossessory action. *Harper v. JP Morgan Chase Bank Nat'l Ass'n*, 305 Ga. App. 536, 699 S.E.2d 854 (2010).

Unless prevented by appeal or enumeration of error.

Defendants successfully sought an interlocutory appeal from the state court's order striking the defendants' arbitration defense, the state-court judgment was affirmed by the Court of Appeals of Georgia, and the Supreme Court of Georgia denied certiorari, so the judgment was now final for all preclusive purposes. *Cnty. State Bank v. Strong*, 651 F.3d 1241 (11th Cir. 2011).

Questions decided by appellate court binding as law of case.

Because a contempt order was previously affirmed on appeal by the Georgia Court of Appeals, a claim made thereafter that the order was void was rejected, as the affirmed order became the law of the case. *Rice v. Lost Mt. Homeowners Ass'n*, 288 Ga. App. 714, 655 S.E.2d 214 (2007), cert. denied, 2008 Ga. LEXIS 376 (Ga. 2008).

An affidavit of the plaintiff limited liability company's sole member did not demand summary judgment for the plaintiffs because the evidentiary posture of the case had not changed by the addition of the affidavit given the similarity of the arguments and evidence presented in the current and previous appeals before the appellate court; the affidavit was parol evidence, which a court could not consider unless an ambiguity existed in the contract, and there was no ambiguity in the parties' agreement. *IH Riverdale, LLC v. McChesney Capital Partners, LLC*, 292 Ga. App. 841, 666 S.E.2d 8 (2008).

In an action regarding an alleged defect in a home's septic system, the home buyers' agent was properly granted summary judgment as to a fraud claim based on the law of the case doctrine under O.C.G.A. § 9-11-60(h) because on a prior interlocutory appeal, the court reversed the trial court's denial of summary judgment to the listing agent, finding justifiable reliance had not been shown as to the fraud claim as no question existed that the buyers were informed through their agent that the septic tank had been pumped twice within a four-month period. *Davis v. Silvers*, 295 Ga. App. 103, 670 S.E.2d 805 (2008).

As a prior action arising from a real estate contract dispute resolved the issue of attorney fees against an attorney and the attorney's clients pursuant to O.C.G.A. § 9-15-14, that became the law of the case pursuant to O.C.G.A. § 9-11-60(h), such that a second action seeking attorney fees against the attorney was precluded. *Fortson v. Hardwick*, 297 Ga. App. 603, 677 S.E.2d 784 (2009), cert. denied, No. S09C1447, 2009 Ga. LEXIS 407 (Ga. 2009).

In appellees' suit to recover attorney fees from appellants, the appellate court's opinion had specified the hours appellees spent on an appeal which appellants had claimed were fraudulent. As appellees deleted those challenged hours from the billing they presented to the trial court on remand, there were no issues to be tried; pursuant to O.C.G.A. § 9-11-60(h), the appellate court's prior decision was binding on the trial court as the law of the case. Furthermore, the trial court did not err in striking appellants' amended answer raising, for the first time, a statute of limitations defense as the prior appellate court ruling was determinative of all claims. *Falanga v. Kirschner & Venker, P.C.*, 298 Ga. App. 672, 680 S.E.2d 419 (2009).

Because the Supreme Court of Georgia had already held on certiorari that a defendant's claims challenging the constitutionality of consecutive sentences were properly the subject of a motion to vacate a void sentence, that order constituted the law of the case, and the trial court was not authorized to make any ruling to the con-

trary, including the court's ruling that the defendant's constitutional challenges were waived. *Rooney v. State*, 287 Ga. 1, 690 S.E.2d 804, cert. denied, U.S. 131 S. Ct. 117, 178 L. Ed. 2d 72 (2010).

Trial court erred in granting summary judgment in favor of a former clerk and a deputy clerk in an inmate's action alleging that they breached their duty to notify the department of corrections of the inmate's amended sentence as required by O.C.G.A. § 42-5-50(a), because the court of appeals previously ruled in the case that the clerks were not entitled to official immunity in their individual capacities for failing to perform the ministerial act of communicating the inmate's sentence to the DOC, and nothing in the record following remand changed that ruling; § 42-5-50(a) is imperative, and its performance is neither discretionary nor dependent upon a direction from the parties at interest. *McGee v. Hicks*, 303 Ga. App. 130, 693 S.E.2d 130 (2010), aff'd, 289 Ga. 573, 713 S.E.2d 841 (2011).

Trial court erred in denying the defendant's challenge to the jury traverse on the ground that it lacked jurisdiction since the defendant was essentially seeking a writ of mandamus because in its order transferring the defendant's appeal to the court of appeals, the supreme court held that the matter did not involve a mandamus action brought against a public officer, and instead involved only the denial of a motion in a criminal case, and that transfer order established the rule of the case. *MacBeth v. State*, 304 Ga. App. 466, 696 S.E.2d 435 (2010).

Trial court did not err in ruling that under the law of the case rule, O.C.G.A. § 9-11-60(h), the defendant's custodial statement could not be used for retrial because the court of appeals had explicitly determined that the custodial statement at issue had been procured in violation of defendant's Sixth Amendment right to counsel, and such determination stood as the law of the case between the parties; because the suppression ruling concerning defendant's custodial statement had already received interim appellate review, the trial court correctly determined that the issue was governed by the law of the case rule. *State v. Stone*, 304 Ga. App. 695, 697 S.E.2d 852 (2010).

Clerk's duty to notify under O.C.G.A. § 42-5-50. — Court of Appeals erred in determining that the law of the case required a finding that a clerk's duty to notify the department of corrections of sentencing orders under O.C.G.A. § 42-5-50 was discretionary rather than ministerial because the Court of Appeals' prior decision did not resolve whether the clerk's acts were discretionary or ministerial but merely recognized that the plaintiff was asserting that the duties were ministerial. *Hicks v. McGee*, 289 Ga. 573, 713 S.E.2d 841 (2011).

Applicability.

Testimony, in the defendant's second murder trial, given by two witnesses who had been jurors in the defendant's first murder trial, that the jurors heard the defendant make an admission of guilt while exiting the courtroom during the first trial, did not violate the law of the case rule, despite the fact that a footnote in a prior appellate opinion mentioned that the record indicated that the jury had exited the courtroom before the defendant made the statement; the footnote was not a "ruling" so as to have been binding in subsequent proceedings. *Slakman v. State*, 280 Ga. 837, 632 S.E.2d 378 (2006), cert. denied, 549 U.S. 1218, 127 S. Ct. 1273, 167 L. Ed. 2d 95 (2007).

Because the law of the case doctrine did not apply to issues not previously ruled upon below, enumerated as error on appeal, or discussed in a prior appellate decision, the trial court erred in denying summary judgment to a boat's charterer, and partial summary judgment to both the charterer and the boat's owner, in an action arising out of injuries sustained by a longshoreman while on board a cargo ship, as the law of the case rule did not preclude consideration of the charterer's status and the issue of whether both were liable under the International Safety Management Code, as such were not previously addressed by the trial court. *Eastern Car Liner, Ltd. v. Kyles*, 280 Ga. App. 362, 634 S.E.2d 129 (2006).

In a dispute between adjoining landowners over title to approximately six acres of land, the Supreme Court of Georgia's prior finding that the deeds relied upon by appellant neighbors to convey the

property to a third party were insufficient as a matter of law, was binding as the law of the case under O.C.G.A. § 9-11-60(h), and no amount of new evidence could change the court's holding that the deeds bore an insufficient description of the property to be conveyed, as such was a question of law unaffected by circumstances extrinsic to the deeds themselves. *Pirkle v. Turner*, 281 Ga. 846, 642 S.E.2d 849 (2007).

Because the trial court, in a prior injunction proceeding, rejected a landowner's claim to a prescriptive right to maintain a garage encroachment by virtue of having received permission to build the garage and having erected the garage three years prior to the lawsuit, the claim was barred in a later proceeding as the law of the case; moreover, the landowner was prohibited from changing the evidentiary posture of the case merely by changing testimony as to when the garage was built after summary judgment was already granted on the issue. *Daiss v. Bennett*, 286 Ga. App. 108, 648 S.E.2d 462 (2007).

The law of the case rule of O.C.G.A. § 9-11-60(h) did not prevent a court from deciding the issue of a county's entitlement to sovereign immunity because in an earlier appellate decision the court had not considered the issue of sovereign immunity. *DeKalb State Court Prob. Dep't v. Currid*, 287 Ga. App. 649, 653 S.E.2d 90 (2007), aff'd, *Currid v. DeKalb State Court Prob. Dep't*, 285 Ga. 184, 674 S.E.2d 894 (2009).

Former employer did not expand the evidentiary record in the trial court by submitting an affidavit in support of a second motion to set aside a default judgment after the appellate court entered an order denying the employer's application for discretionary appeal from the denial of a first motion but instead submitted the affidavit one month prior to the appellate court's denial; thus, the law of the case rule under O.C.G.A. § 9-11-60(h) applied, and the trial court improperly granted the second motion. *Guthrie v. Wickes*, 295 Ga. App. 892, 673 S.E.2d 523 (2009).

Because the appellate court, in a wrongful death action against a county, did not

directly address whether the Community Service Act, O.C.G.A. § 42-8-70 et seq., waived sovereign immunity but instead focused on the issue of gross negligence on a prior appeal, the law of the case rule of O.C.G.A. § 9-11-60(h) could not be expanded to encompass an implied ruling on an implied finding of a waiver of sovereign immunity. *Currid v. DeKalb State Court Prob. Dep't*, 285 Ga. 184, 674 S.E.2d 894 (2009).

Denial of practice groups' motion to dismiss parents' medical malpractice action based on the parents' failure to comply with the expert affidavit requirement of former O.C.G.A. § 9-11-9.1 was error because a prior appellate decision concluded that, at the time the litigation was brought, the question of whether a plaintiff was subject to the expert affidavit requirement depended not on the identity of the defendant, but on the cause of action, and explicitly held that, without an expert affidavit, the parents could have sustained only an ordinary negligence claim; the trial court's ruling, which held that because the practice groups were not licensed professionals or licensed health care facilities, no expert affidavit was needed, violated the law of the case. The parents could not have successfully argued on the appeal that the parents' malpractice claims were exempt from the ex-

pert affidavit requirement. *Atlanta Women's Health Group, P.C. v. Clemons*, 299 Ga. App. 102, 681 S.E.2d 754 (2009).

Not sole remedy in conversion action. — In a conversion action brought by a vehicle owner against the owner of a towing company, there was no merit to the towing company owner's argument that O.C.G.A. § 9-11-60(d) was the exclusive vehicle by which the vehicle owner, who was not a party to the foreclosure proceedings involving the vehicle, was entitled to seek relief. Thus, the trial court did not lack jurisdiction to consider the conversion action. *Horner v. Robinson*, 299 Ga. App. 327, 682 S.E.2d 578 (2009).

Res judicata.

Trial court erred in granting a limited liability company summary judgment in the company's ejectment action against a property owner on the ground of res judicata under O.C.G.A. § 9-12-40 because there remained a question of fact regarding whether the owner was a party to the prior action; the owner asserted and presented affidavit evidence supporting the claim that the trial court in the quiet title action lacked personal jurisdiction over the owner, thus creating a genuine issue of material fact regarding whether the owner was a party to the earlier litigation. *James v. Intown Ventures, LLC*, No. S11A1705, 2012 Ga. LEXIS 194 (Feb. 27, 2012).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 15 Am. Jur. Pleading and Practice Forms, Judgments, § 291. 18B Am.

Jur. Pleading and Practice Forms, New Trial, § 14.

9-11-61. Harmless error.

JUDICIAL DECISIONS

Harm, as well as error, required for showing. — Parent alleged the trial court erred in denying the parent a copy of the transcript of the hearing on the petition for termination of parental rights for use at a new trial hearing. Under O.C.G.A. § 9-11-61, the parent was required not only to show error, but harm as well, and no such showing was made. *In re D. R.*, 298 Ga. App. 774, 681 S.E.2d 218 (2009),

overruled on other grounds, *In re A.C.*, 285 Ga. 829, 686 S.E.2d 635 (2009).

Judge's characterization admitted in error but error harmless. — Even though it was error to allow a federal judge's characterization of a principal's transactions as a sham into evidence in a breach of an employment contract suit, such error was harmless. *Ins. Indus. Consultants, LLC v. Alford*, 294 Ga. App. 747,

669 S.E.2d 724 (2008), cert. denied, No. S09C0465, 2009 Ga. LEXIS 200 (Ga. 2009).

9-11-62. Stay of proceedings to enforce a judgment.

JUDICIAL DECISIONS

Exemption of injunction cases from automatic supersedeas.

Trial court had authority to hold a property owner in contempt for failure to comply with a court order that imposed a permanent restraining order in favor of the owner's neighbors, even though the order was on appeal, as there was no order by the court that stayed the judgment pending appeal, pursuant to O.C.G.A. § 9-11-62(a), which was an exception to the automatic supersedeas provisions of O.C.G.A. § 5-6-46. *Knapp v. Cross*, 279 Ga. App. 632, 632 S.E.2d 157 (2006).

Because a property owner complied with an injunction without first obtaining a grant of supersedeas, the owner's appeal from the judgment granting the injunction was dismissed as moot, pursuant to a rule of equitable jurisprudence and appellate procedure, as well as O.C.G.A. § 9-11-62(a). *Babb v. Putnam County*, 269 Ga. App. 431, 605 S.E.2d 33 (2004).

Exemption of administrative decisions from automatic supersedeas.

In an action in which the school district appealed an administrative law judge's

(ALJ) decision in favor of the parents that awarded \$14,875 to the parents for reimbursement of the cost of private education services provided to the child and paid for by the child's parents, enforcement of that provision of the ALJ's final decision was stayed pursuant to Fed. R. Civ. P. 62(f) because in Georgia, the school district was a county agency, under O.C.G.A. § 9-11-62(d), the district would be entitled to a stay without having to post a bond. *Dekalb County Sch. Dist. v. J.W.M.*, 445 F. Supp. 2d 1371 (N.D. Ga. 2006).

Exempting custody provisions for the supersedeas action. — Appellate court found no error in the trial court's inclusion in its grant of a husband's motion for supersedeas bond a provision excepting the custody provisions of the final decree from the supersedeas arising from the wife's filing of a motion for new trial. *Frazier v. Frazier*, 280 Ga. 687, 631 S.E.2d 666 (2006).

Cited in *Goswick v. Murray County Bd. of Educ.*, 281 Ga. App. 442, 636 S.E.2d 133 (2006); *Coleman v. Retina Consultants, P.C.*, 286 Ga. 317, 687 S.E.2d 457 (2009); *Blackmore v. Blackmore*, 311 Ga. App. 885, 717 S.E.2d 504 (2011).

ARTICLE 8

PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

9-11-65. Injunctions and restraining orders.

Law reviews. — For survey article on zoning and land use law, see 59 *Mercer L. Rev.* 493 (2007).

For comment, "Engendering Fairness in

Domestic Violence Arrests: Improving Police Accountability Through the Equal Protection Clause," see 60 *Emory L.J.* 1011 (2011).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

INTERLOCUTORY INJUNCTIONS

1. IN GENERAL
2. CONSOLIDATION

TEMPORARY RESTRAINING ORDERS

FORM AND SCOPE OF INJUNCTIONS AND RESTRAINING ORDERS

General Consideration**Issuance of injunctive relief without notice and hearing.**

Because a homeowner asked for a hearing on the permanent injunctive relief the homeowner was seeking, the homeowner would not be heard to argue a lack of notice that the hearing would be a final hearing on the merits of the injunction. *Meacham v. Franklin-Heard County Water Auth.*, 302 Ga. App. 69, 690 S.E.2d 186 (2009), cert. denied, No. S10C0865, 2010 Ga. LEXIS 427 (Ga. 2010).

Right to recover actual damage resulting from a wrongful restraint, etc.

Trial court granted the employee leave to amend the answer to include a claim for wrongful restraint, which remained pending below, and thus, the appellate court had to decide whether the restrictive covenant actually enforced against the employee was illegal; if the restrictive covenant was, then the employee's wrongful restraint claim was meritorious, and the employee could recover such costs and damages, O.C.G.A. § 9-11-65(c), as the employee may have suffered during the period of the injunction's enforcement. Therefore, the ex-employer's motion to dismiss the appeal as moot under O.C.G.A. § 5-6-48(b)(3) was denied. *Cox v. Altus Healthcare & Hospice, Inc.*, 308 Ga. App. 28, 706 S.E.2d 660 (2011).

Permanent injunction to preserve property owners association's covenants. — Trial court properly entered an injunction against a husband and wife requiring them, as homeowners and members of a neighborhood property owners association, to remove a chain link fence that was not allowed pursuant to the association's covenants, and the association did not waive enforcement, nor did estoppel apply to grant the husband and wife an exception from the association's rules. *Wright v. Piedmont Prop. Owners Ass'n*, 288 Ga. App. 261, 653 S.E.2d 846 (2007).

Cited in *Bishop v. Patton*, 288 Ga. 600, 706 S.E.2d 634 (2011); *Davis v. Wallace*, 310 Ga. App. 340, 713 S.E.2d 446 (2011).

Interlocutory Injunctions**1. In General****Treatment of fact issues on hearing of application for interlocutory injunction.**

In an action arising out of an alleged breach of a land sales contract, given that the trial court relied on findings of fact that had been resolved only in the context of the ruling on an interlocutory injunction filed by the buyer, and that issues of material fact plainly remained as to whether the seller fulfilled the contractual obligations to designate land adjacent to the buyer's property for use as a city or county road, the trial court's grant of summary judgment to the seller had to be reversed. *Taylor v. Thomas*, 286 Ga. App. 27, 648 S.E.2d 426 (2007).

Discretion of judge as to grant of interlocutory injunction.

Absent any findings that the status quo was endangered or in need of preservation, and because an interlocutory injunction did not in fact preserve the status quo but forced a dog kennel owner to cease operations, the trial court abused its discretion in granting relief to an adjacent neighbor of the business, especially where that business had been in operation for several years without complaint. *Green v. Waddleton*, 288 Ga. App. 369, 654 S.E.2d 204 (2007).

Trial court did not abuse the court's discretion in issuing an interlocutory injunction enjoining officers from disposing of any of the documents or assets of a corporation and continuing a receivership because the officers controlled the assets that were a subject of the litigation, raising the possibility that the assets could be dissipated before the litigation is resolved; although the officers made several vague arguments about the powers granted to

the receiver, the officers failed to show that the trial court abused the court's discretion in granting those powers. *Pittman v. State*, 288 Ga. 589, 706 S.E.2d 398 (2011).

Manifest abuse of trial court's discretion found. — In a cause of action involving a dispute between joint venturers, the trial court manifestly abused the court's discretion in granting a temporary injunction which prohibited plaintiff from engaging in any act which would have the effect of contesting the voting rights of investors in plaintiff's member entities, when those investors wanted to use the votes to gain control of plaintiff and dismiss the lawsuit. The injunction did not maintain the status quo and failed to balance the equities of the parties properly. *Hampton Island Founders v. Liberty Capital*, 283 Ga. 289, 658 S.E.2d 619 (2008).

Order denying interlocutory injunction held erroneous. — In a suit brought by a property owner seeking to specifically perform an oral agreement to purchase a strip of real estate, the trial court properly denied the property owner's request for an interlocutory judgment based on a violation of the statute of frauds and because another held a first right of refusal over the sale/purchase of the property. However, the trial court erred by concluding that the property owner had not obtained a parol license to use the strip since the property owner had made expenditures to improve the land and, as to the right of first refusal held by another, the grant of a parol license was not the equivalent to a sale of the property to have in anyway interfered with that right. *Meinhardt v. Christianson*, 289 Ga. App. 238, 656 S.E.2d 568 (2008).

2. Consolidation

Consolidation not permitted where party objects.

In an action by a city to, *inter alia*, compel a county tax commissioner to pay school tax receipts, a trial court erred in converting a hearing on an interlocutory injunction into a final hearing on a permanent injunction and a writ of mandamus without the proper notice under O.C.G.A. § 9-6-27(a); the commissioner was only

given two days' notice and also did not consent to having any mandamus issue heard by the trial court without a jury under § 9-6-27(c) or to having the request for permanent injunctive relief under O.C.G.A. § 9-11-65(a)(2) heard at the same time. *Ferdinand v. City of Atlanta*, 285 Ga. 121, 674 S.E.2d 309 (2009).

Temporary Restraining Orders

Mootness.

Officers' argument that a temporary restraining order (TRO) was invalid was moot because the TRO had been superseded by an interlocutory injunction, and the officers did not argue that any alleged error in entering the TRO somehow infected the interlocutory injunction, which was entered after notice to the officers and a full hearing. *Pittman v. State*, 288 Ga. 589, 706 S.E.2d 398 (2011).

Temporary restraining order valid against corporation. — Temporary restraining order entered against a corporation and the corporation's officers was not invalid because the verified complaint and the state's attorney's certification were sufficient under O.C.G.A. § 9-11-65 to show that immediate and irreparable injury would result unless relief was granted before the officers could be heard in opposition and why notice would not be required. *Pittman v. State*, 288 Ga. 589, 706 S.E.2d 398 (2011).

Form and Scope of Injunctions and Restraining Orders

Injunction improper where order not specific in terms.

Order enjoining the construction of a cell phone tower on leased property was vacated because it did not comply with O.C.G.A. § 9-11-65(d) by describing the property subject to the injunction in reasonable detail; O.C.G.A. § 9-11-65(d) was to be strictly applied in the context of interests in land, and the order's attempt to describe the property subject to the injunction by making reference to a lease attempted an impermissible incorporation by reference. *Verticality, Inc. v. Warnell*, 282 Ga. App. 873, 640 S.E.2d 369 (2006).

Preservation of marital asset. — In divorce proceedings, a trial court was within the court's discretion under

O.C.G.A. § 9-11-65(e) to order that a former wife pay the amount remaining from a line of credit the wife took out on the parties' marital residence into the court registry as evidence was presented that the wife had been dissipating a significant marital asset without notice to the former husband. *Hunter v. Hunter*, 289 Ga. 9, 709 S.E.2d 263 (2011).

Trial court could enjoin non-parties over whom court lacked personal jurisdiction. — Trial court did not err in

enjoining property managers who were the defendants in a suit involving a property management agreement from pursuing a suit regarding the same agreement in Virginia. Under O.C.G.A. § 9-11-65(d), the injunction also properly reached the defendants' associated entities over whom the trial court lacked personal jurisdiction. *Am. Mgmt. Servs. East, LLC v. Fort Benning Family Cmtys., LLC*, 313 Ga. App. 124, 720 S.E.2d 377 (2011).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 14 Am. Jur. Pleading and Practice Forms, Injunctions, §§ 4, 87, 98, 127.

9-11-67. Deposit in court.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 8B Am. Jur. Pleading and Practice Forms, Deposits In Court, § 1.

9-11-68. Offers of settlement; damages for frivolous claims or defenses.

Law reviews. — For article on 2005 amendment of this section, see 22 Ga. St. U.L. Rev. 221 (2005). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008). For annual

survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

For note, "The Swift, Silent Sword Hiding in the (Defense) Attorney's Arsenal: The Inefficacy of Georgia's New Offer of Judgment Statute as Procedural Tort Reform," 40 Ga. L. Rev. 995 (2006).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 9-11-68(b)(1) does not merely prescribe the methods of enforcing rights and obligations, but rather affects the rights of parties by imposing an additional duty and obligation to pay an opposing party's attorney fees when a final judgment does not meet a certain amount or is one of no liability; by creating this new obligation, the statute operates as a substantive law, which is unconstitutional under Ga. Const. 1983, Art. I, Sec. I, Para. X, given

its retroactive effect to pending cases. *Fowler Props. v. Dowland*, 282 Ga. 76, 646 S.E.2d 197 (2007).

Trial court clearly erred in finding that the Tort Reform Act of 2005, O.C.G.A. § 9-11-68, impeded access to the courts and violated Ga. Const. 1983, Art. I, Sec. I, Para. XII, because Ga. Const. 1983, Art. I, Sec. I, Para. XII was never intended to provide a right of access to the courts, but was intended to provide only a right of choice between self-representation and

representation by counsel; § 9-11-68(b)(1) does not deny litigants access to the courts but simply sets forth certain circumstances under which attorney's fees can be recoverable, and, therefore, even if a constitutional right of access to the courts provision did exist, it would not be applicable. *Smith v. Baptiste*, 287 Ga. 23, 694 S.E.2d 83 (2010).

Trial court erred in finding that the Tort Reform Act of 2005, O.C.G.A. § 9-11-68, violated Ga. Const. 1983, Art. I, Sec. I, Para. XII, since the court permitted the recovery of attorney's fees absent the prerequisite showings of either O.C.G.A. § 9-15-14 or O.C.G.A. § 13-6-11, because there was no constitutional requirement that attorney's fees be awarded only pursuant to § 9-15-14 or § 13-6-11; in Georgia, attorney's fees are recoverable when authorized by some statutory provision or by contract, and § 9-11-68, is such a statutory provision authorizing the recovery of attorney's fees under specific circumstances. *Smith v. Baptiste*, 287 Ga. 23, 694 S.E.2d 83 (2010).

Tort Reform Act of 2005, O.C.G.A. § 9-11-68, does not violate the uniformity clause of the Georgia Constitution, Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a), because § 9-11-68 is a general law since it applies uniformly throughout the state to all tort cases; the purpose of the general law to encourage litigants in tort cases to make and accept good faith settlement proposals in order to avoid unnecessary litigation is a legitimate legislative purpose, consistent with the state's strong public policy of encouraging negotiations and settlements, and the fact that the statute applies to tort cases, but not other civil actions, does not render it an impermissible special law. *Smith v. Baptiste*, 287 Ga. 23, 694 S.E.2d 83 (2010).

Construction with other law. — Upon a proper appeal from a final order, while neither O.C.G.A. § 24-9-67.1 nor O.C.G.A. § 9-11-16 required that a complaint be dismissed or stricken for failing to comply with the terms of those statutes, unlike the Anti-SLAPP statute, codified at O.C.G.A. § 9-11-11.1, because the trial court did not enter a final judgment within the meaning of O.C.G.A. § 9-11-68(b)(1), attorney fees were prop-

erly denied; moreover, a right to dismiss voluntarily without prejudice would be meaningless if doing so would trigger the payment of the defendant's attorney fees. *McKesson Corp. v. Green*, 286 Ga. App. 110, 648 S.E.2d 457 (2007), cert. denied, 2007 Ga. LEXIS 656 (Ga. 2007).

Retroactive application of statute proper. — Trial court did not err when the court applied the 2006 version of O.C.G.A. § 9-11-68 in the property owners' action against the builders because, inasmuch as the owners did not obtain any judgment amount in the owners' favor, it did not matter whether the original or amended version of the statute was applied, or whether the amendment was substantive or procedural in nature; under either version of the statute the owners were liable for the builders' reasonable fees and expenses from the date the offer of settlement was rejected. *O'Leary v. Whitehall Constr.*, 288 Ga. 790, 708 S.E.2d 353 (2011).

Preemption. — Fed. R. Civ. P. 68 did not preempt O.C.G.A. § 9-11-68 because the two were not in direct collision, and there was no reason to believe § 9-11-68 could not be applied in harmony with Rule 68 and, also, because § 9-11-68 was substantive in nature and did not conflict with Rule 68, the Georgia statute was not preempted by the federal rule. *Wheatley v. Moe's Southwest Grill, LLC*, 580 F. Supp. 2d 1324 (N.D. Ga. 2008).

Challenge to statute did not require service on Attorney General. — Because a personal injury plaintiff challenging the constitutionality of O.C.G.A. § 9-11-68(d) was not required by Georgia law to serve the Attorney General with notice of the action, an order granting defendants' motion for attorney fees under § 9-11-68(d) was reversed. *Buchan v. Hobby*, 288 Ga. App. 478, 654 S.E.2d 444 (2007).

Provision not retroactive. — Plaintiffs in a medical malpractice and contract case were not entitled to attorney's fees because they did not specifically plead O.C.G.A. § 13-6-11 and did not allege any bad faith by a doctor and clinic. Further, claims for fees under O.C.G.A. § 9-11-68 were properly dismissed on directed verdict because the statute was not effect at

the time the complaint was filed; because the statute added duties and obligations, it could not be retroactive. *Morrison v. Mann*, No. 07-11294, 2008 U.S. App. LEXIS 6772 (11th Cir. Mar. 26, 2008) (Unpublished).

Statute had no application as it became effective during pendency of litigation. — Because O.C.G.A. § 9-11-68 did not apply as the statute became effective during the pendency of the litigation, because the trial court failed to include specific findings of fact to support an award of attorney's fees and costs of litigation under O.C.G.A. § 9-15-14, and because neither the first driver nor the first driver's attorney were afforded an opportunity to be heard before sanctions were imposed, the trial court erred in awarding the second driver attorney's fees and costs of litigation. *Olarsch v. Newell*, 295 Ga. App. 210, 671 S.E.2d 253 (2008).

Because O.C.G.A. § 9-11-68 was not in effect when an action a husband and wife filed against a company accrued, the couple was not entitled to a benefit conferred on the plaintiffs by the statute, which was the right to recover the couple's own attorney's fees and expenses of litigation if the company had rejected the couple's settlement demand and if the couple had obtained a final judgment in an amount greater than 125 percent of such offer of settlement. *L. P. Gas Indus. Equip. Co. v. Burch*, 306 Ga. App. 156, 701 S.E.2d 602 (2010).

Trial court did not err in denying a company's motion pursuant to O.C.G.A. § 9-11-68 to recover the attorney fees and expenses of litigation the company incurred after a husband and wife rejected the company's settlement offer because § 9-11-68 was inapplicable. O.C.G.A. § 9-11-68(b) operated as a substantive law, and it was not yet in effect when the substantive rights of the husband and wife became fixed; thus, the couple was entitled to seek compensation in tort from the company, free from any duty and obligation to pay attorney fees if the couple failed to obtain a final judgment that was at least 75 percent of any offer of settlement. *L. P. Gas Indus. Equip. Co. v. Burch*, 306 Ga. App. 156, 701 S.E.2d 602 (2010).

Rejection of second offer does not negate rejection of first offer. — After an insurer made an offer of settlement to a widower and an estate administrator, the fact that the insurer made another offer of settlement, which was also rejected, did not negate the effect of the rejection of the first offer for purposes of seeking attorney fees and costs under O.C.G.A. § 9-11-68, after a jury rendered a verdict of no liability for the insurer. *Great West Cas. Co. v. Bloomfield*, 303 Ga. App. 26, 693 S.E.2d 99 (2010).

Settlement offer not made in good faith. — Truck driver's and owner's offer of settlement for \$ 25,000 under O.C.G.A. § 9-11-68 was not made in good faith, although ultimately a second truck driver was found 100 percent liable to the decedent, because it was a wrongful death case in which the accident would not have occurred but for the first truck driver's admitted negligence. *Great West Cas. Co. v. Bloomfield*, 313 Ga. App. 180, 721 S.E.2d 173 (2011).

Post-judgment motions for fees does not toll the time to appeal from final judgment. — Supreme court was without jurisdiction to review the propriety or substance of the trial court's order denying the property owners' motion for new trial because the owners failed to timely file a notice of appeal in regard to that order, and the builders' post-judgment motions for fees under O.C.G.A. §§ 9-11-68 and 9-15-14 did not toll the time for the owners' to appeal from the order denying the owners' motion for new trial; the trial court entered a final judgment on October 4, 2007, and the owners' filing of a motion for new trial tolled the time for appeal under O.C.G.A. § 5-6-38(a), but as soon as the trial court issued the court's order disposing of the motion for new trial, the thirty-day time period to file a notice of appeal began to run, and the owners' filed the motion for new trial on March 9, 2009. *O'Leary v. Whitehall Constr.*, 288 Ga. 790, 708 S.E.2d 353 (2011).

Motion for attorney's fees meritless. — That portion of defendants' renewed motion for attorney's fees that sought attorney's fees and expenses of litigation incurred on appeal was

meritless since O.C.G.A. § 9-11-68 expressly limited the award of fees and expenses to those incurred “from the date of the rejection of the offer of settlement through the entry of judgment”. *Wheatley v. Moe’s Southwest Grill, LLC*, 580 F. Supp. 2d 1324 (N.D. Ga. 2008).

Basis for denying fees and costs should be set forth in trial court’s order. — In a case in which (1) a widower and an estate administrator rejected an insurer’s offer of settlement, and (2) the jury later entered a verdict in favor of the insurer, and (3) the trial court denied the insurer’s motion for fees and costs, remand was required because the trial court did not set forth the basis for the court’s determination, as required by O.C.G.A. § 9-11-68(d)(2). *Great West Cas. Co. v. Bloomfield*, 303 Ga. App. 26, 693 S.E.2d 99 (2010).

Award of attorney’s fees and expenses proper. — School’s offer of judgment under O.C.G.A. § 9-11-68 to a parent to settle the parent’s slander claims for \$750 was not made in bad faith; the school reasonably and correctly anticipated that the school’s exposure was minimal. Similarly, the fact that the school ultimately incurred \$84,000 in fees and expenses did not preclude a finding of good faith. *Cohen v. Alfred & Adele Davis Acad., Inc.*, 310 Ga. App. 761, 714 S.E.2d 350 (2011), cert. denied, No. S11C1795, 2011 Ga. LEXIS 976 (Ga. 2011).

Because a retroactive application of O.C.G.A. § 9-11-68 would have impaired the offeror’s rights to recover attorney’s fees and costs, the trial court did not err in applying the statute in effect at the time the offer was made. *Kromer v. Bechtel*, 289 Ga. App. 306, 656 S.E.2d 910 (2008).

Particularity requirement met. — Offer of settlement met the particularity requirements of O.C.G.A. 9-11-68(a)(4), even though acceptance of the offer required execution of a release, which was not attached to the settlement offer. *Great West Cas. Co. v. Bloomfield*, 303 Ga. App. 26, 693 S.E.2d 99 (2010).

Preservation for review. — The court of appeals declined to address the constitutional issues raised for the first time on appeal by an offeree, and even if the issues had been raised below, jurisdiction would have been in the supreme court. *Kromer v. Bechtel*, 289 Ga. App. 306, 656 S.E.2d 910 (2008).

Because the appellees did not raise the issue that retroactive application of the Tort Reform Act of 2005, O.C.G.A. § 9-11-68, was unconstitutional in the trial court and obtain a distinct ruling on it from that court, the issue could not be considered for the first time in the supreme court. *Smith v. Baptiste*, 287 Ga. 23, 694 S.E.2d 83 (2010).

Cited in *Wildcat Cliffs Builders, LLC v. Hagwood*, 292 Ga. App. 244, 663 S.E.2d 818 (2008).

RESEARCH REFERENCES

ALR. — Recoverable costs under state offer of judgment rule, 34 ALR6th 431.

9-11-70. Judgment for specific acts; vesting title.

JUDICIAL DECISIONS

Decree granting a life estate in property took precedence over quitclaim deed. — Husband’s quitclaim deed of property to his second wife did not take priority over a recorded divorce decree

stating that the husband had only a life estate in the property with his two children from his first marriage as remaindermen. *Price v. Price*, 286 Ga. 753, 692 S.E.2d 601 (2010).

ARTICLE 9

GENERAL PROVISIONS

9-11-81. Applicability.

JUDICIAL DECISIONS

Condemnation proceedings.

Trial court properly refused to dismiss a landowner's appeal on grounds that it failed to express dissatisfaction with the compensation awarded by the special master, as it provided the utility with sufficient notice, under the Civil Practice Act, O.C.G.A. § 9-11-1 et seq., that the landowner was objecting to the valuation given on his property; moreover, in light of the interest that the utility acquired in the property, and the purposes for which it intended to use that property, consequential damages potentially represented a significant portion of the compensation the landowner could recover. *Ga. Power Co. v. Stowers*, 282 Ga. App. 695, 639 S.E.2d 605 (2006).

Civil renewal provisions apply in habeas corpus proceedings. — O.C.G.A. § 9-14-42(c) was not a statute of repose and not an absolute bar to the refile of a habeas corpus petition, and therefore, was not in conflict with the provisions of O.C.G.A. §§ 9-2-60(b) and (c) and 9-11-41(e), which allowed for the renewal of civil actions after dismissal. Therefore, the habeas court's dismissal of a petition as untimely was reversed. *Phagan v. State*, 287 Ga. 856, 700 S.E.2d 589 (2010).

The Civil Practice Act (see O.C.G.A. Ch. 11, T. 9) does not apply to juvenile courts.

Juvenile court properly concluded that the court had no authority to impose attorney fees under the Civil Practice Act, O.C.G.A. § 9-15-14, because the juvenile court had not adopted O.C.G.A. § 9-15-14, and there was no implicit attorney fee award for frivolous litigation in the Juvenile Court Code, O.C.G.A. § 15-11-1 et seq.; the Act does not apply to juvenile courts. *In re T.M.M.L.*, 313 Ga. App. 638, 722 S.E.2d 386 (2012).

In rem quiet title actions. — Default judgment against owners in a quiet title action based on their failure to answer was improper because, once the in rem proceeding was instituted, the trial court was required, pursuant to O.C.G.A. § 23-3-63, to submit the matter to a special master, and a special master was never appointed such that service could have properly been completed pursuant to the Quiet Title Act, O.C.G.A. § 23-3-60 et seq.; since the Quiet Title Act provided specific rules of practice and procedure with respect to an in rem quiet title action against all the world, the Civil Practice Act, O.C.G.A. § 9-11-1 et. seq., was inapplicable. *Woodruff v. Morgan County*, 284 Ga. 651, 670 S.E.2d 415 (2008).

Application to attorney fees. — The trial court did not err in granting declaratory relief to an attorney via a default judgment because a petition for declaratory judgment was an action at law pursuant to O.C.G.A. § 9-4-2 and a petition for declaratory judgment was governed by the practice rules contained in the Civil Practice Act, specifically O.C.G.A. § 9-11-81, including the rules pertaining to default judgment; the attorney was entitled to a judgment that a doctor was not entitled to attorney fees from the doctor's former spouse under O.C.G.A. § 9-15-14(b) based on the admissions that the former spouse had successfully obtained a family violence protective order against the doctor and that this order was only vacated after the former spouse agreed to voluntarily dismiss the case. *Vaughters v. Outlaw*, 293 Ga. App. 620, 668 S.E.2d 13 (2008).

Cited in *Ga. Pines Cmty. Serv. Bd. v. Summerlin*, 282 Ga. 339, 647 S.E.2d 566 (2007); *In re Estate of Ehlers*, 289 Ga. App. 14, 656 S.E.2d 169 (2007); *Weaver v. State*, 299 Ga. App. 718, 683 S.E.2d 361 (2009).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 1 Am. Jur. Pleading and Practice Forms, Accord and Satisfaction, § 33. 2 Am. Jur. Pleading and Practice Forms, Appearance, § 2.

ARTICLE 10**FORMS****9-11-101. Form of summons.**

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2006, “(Clerk will insert number.)” was substituted for “(Clerk will insert number.)” near the beginning of the form.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 20A Am. Jur. Pleading and Practice Forms, Process, § 13.

9-11-109. Form of complaint for negligence.**RESEARCH REFERENCES**

Am. Jur. Pleading and Practice Forms. — 18B Am. Jur. Pleading and Practice Forms, Negligence, § 217.

9-11-111. Form of complaint for conversion.**RESEARCH REFERENCES**

Am. Jur. Pleading and Practice Forms. — 7A Am. Jur. Pleading and Practice Forms, Conversion, § 2.

9-11-119. Form of motion to dismiss, presenting defense of failure to state a claim.**RESEARCH REFERENCES**

Am. Jur. Pleading and Practice Forms. — 19B Am. Jur. Pleading and Practice Forms, Pleading, § 533.

9-11-122. Form of summons and complaint against third-party defendant.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 20A Am. Jur. Pleading and Practice Forms, Process, § 13.

9-11-132. Form of judgment on decision by the court.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 15 Am. Jur. Pleading and Practice Forms, Judges, § 80.

9-11-133. Forms meeting requirements for civil case filing and disposition.

(a) The forms set out in subsections (b), (c), (d), and (e) of this Code section or forms substantially similar to such forms are sufficient to meet the requirements for civil case filing and disposition forms. The civil case forms set out in Exhibit F of the “Report and Recommendations of the 1997-1998 Court Filings Committee” published by the State Bar of Georgia and dated May 15, 1998, are substantially similar to the forms set out in this Code section.

(b) General Civil Case Filing Information Form.

GENERAL CIVIL CASE FILING
INFORMATION FORM
(NONDOMESTIC)

Court
____ Superior County _____ Date filed _____
____ State mm-dd-yyyy

Docket no. _____

Plaintiff(s) (last, suffix,
first, middle initial,
maiden)
1. _____
2. _____
3. _____
4. _____

Defendant(s) (last, suffix,
first, middle initial,
maiden)
1. _____
2. _____
3. _____
4. _____

Plaintiff/petitioner’s attorney

_____ Pro Se
Bar # _____

No. of plaintiffs _____ No. of defendants _____

CHECK PRIMARY CASE TYPE: IF TORT IS CASE TYPE:
(Check only ONE) (Check no more than TWO)

- | | |
|--|---|
| <input type="checkbox"/> Contract/Account | <input type="checkbox"/> Auto Accident |
| <input type="checkbox"/> Wills/Estate | <input type="checkbox"/> Premises Liability |
| <input type="checkbox"/> Real Property | <input type="checkbox"/> Medical Malpractice |
| <input type="checkbox"/> Dispossessory/Distress | <input type="checkbox"/> Other Professional |
| <input type="checkbox"/> Personal Property | <input type="checkbox"/> Negligence |
| <input type="checkbox"/> Equity | <input type="checkbox"/> Product Liability |
| <input type="checkbox"/> Habeas Corpus | <input type="checkbox"/> Other (specify) _____ |
| <input type="checkbox"/> Appeals, Reviews | |
| <input type="checkbox"/> Postjudgment Garnish-
ment, Attachment, or
Other Relief | Are punitive damages pleaded?
<input type="checkbox"/> Yes <input type="checkbox"/> No |
| <input type="checkbox"/> Nondomestic Contempt | |
| <input type="checkbox"/> Tort (If tort, fill in
right column) | |
| <input type="checkbox"/> Other General Civil
(specify) _____ | |

(c) Domestic Relations Case Filing Information Form.

DOMESTIC RELATIONS CASE FILING
INFORMATION FORM

Court
☐ Superior County _____ Date filed _____
mm-dd-yyyy
Docket no. _____

Plaintiff(s) Defendant(s)
(last, suffix, first, middle (last, suffix, first, middle

initial, maiden)

initial, maiden)

1. _____

1. _____

2. _____

2. _____

Plaintiff/Petitioner's attorney

____ Pro Se

Bar #

CONTEMPT

____ Contempt — Custody,

Visitation, or

Parenting Time

CHECK CASE TYPE:

(one or more)

____ Contempt — Child

____ Divorce (includes
annulment)

Support and Alimony

Contested? ____ Yes ____ No

____ Contempt — Child Support

Child Custody

____ Contempt — Alimony

issue? ____ Yes ____ No

____ Other Domestic Contempt

Child Support

issue? ____ Yes ____ No

FAMILY VIOLENCE

____ Separate Maintenance

Additional information —

____ Adoption

Ex Parte Relief

____ Paternity (includes
legitimation)

Did the initial pleading

____ Interstate Support
Enforcement Actioninclude a request for
relief:____ Domestication of
Foreign Custody Decree

1. From alleged family

violence? ____ Yes ____ No

____ Family Violence Act
Petition

2. Was ex parte relief

requested? ____ Yes ____ No

3. Was ex parte relief

granted? ____ Yes ____ No

MODIFICATION

OTHER

<input type="checkbox"/> Modification — Custody, Visitation, or Parenting Time	Have the parties agreed to binding arbitration? <input type="checkbox"/> Yes <input type="checkbox"/> No
Does the modification include a parent selection by a child who is at least 14 years of age? <input type="checkbox"/> Yes <input type="checkbox"/> No	Have the parties reached a custodial agreement <input type="checkbox"/> Yes <input type="checkbox"/> No
<input type="checkbox"/> Modification — Child Support and Alimony	If yes, is custody: <input type="checkbox"/> Joint custody <input type="checkbox"/> Joint legal custody <input type="checkbox"/> Joint physical custody <input type="checkbox"/> Sole custody to: _____
<input type="checkbox"/> Modification — Child Support	Financial affidavit submitted? <input type="checkbox"/> Yes <input type="checkbox"/> No
<input type="checkbox"/> Modification — Alimony	Child support forms submitted? <input type="checkbox"/> Yes <input type="checkbox"/> No

(d) General Civil Case Final Disposition Form.

GENERAL CIVIL CASE FINAL
DISPOSITION FORM
(NONDOMESTIC)

Court

<input type="checkbox"/> Superior	County _____	Date _____
<input type="checkbox"/> State		disposed mm-dd-yyyy

Docket no. _____

Reporting party _____
(Name) (Title)

Name of plaintiff/petitioner(s)

Plaintiff/petitioner’s attorney _____ ☐ Pro Se

Bar # _____

Name of defendant/respondent(s)

Defendant/respondent's attorney _____ Pro Se

Bar # _____

TYPE OF DISPOSITION

1. _____ Pretrial Dismissal
(specify which type)
 - A. _____ Involuntary
 - B. _____ Voluntary (without prejudice)
 - C. _____ Voluntary (with prejudice)
2. _____ Pretrial Settlement
3. _____ Default Judgment
4. _____ Summary Judgment
5. _____ Transferred/
Consolidated
6. _____ Bench Trial
7. _____ Jury Trial (specify outcome further)
 - A. _____ Dismissal after jury selected
 - B. _____ Settlement during trial
 - C. _____ Judgment on Verdict
 - D. _____ Directed Verdict or JNOV

AWARD

1. If verdict for plaintiff, how much was awarded?

\$ _____ compensatory

\$ _____ punitive
2. If verdict on cross or counter claims, how much was awarded?

\$ _____ compensatory

\$ _____ punitive
3. Did the court modify the award?

_____ Yes _____ No
4. Were attorneys fees awarded?

_____ Yes _____ No

ADR

1. Was ADR utilized?

_____ Yes _____ No
2. If yes, was it (check if applicable):

_____ court annexed?

_____ court mandated?
3. Did the matter settle after trial for other than judgment? (If known at the time of this

1. Judgment on verdict.
Was the verdict:
 - A. _____ For plaintiff(s) (all)
 - B. _____ For defendant(s) (all)

C. ____ Other: (explain) _____ submission)
____ Yes ____ No

(e) Domestic Relations Case Final Disposition Information form.

**DOMESTIC RELATIONS CASE FINAL
DISPOSITION INFORMATION FORM**

Court
____ Superior County _____ Date _____
disposed mm-dd-yyyy

Docket no. _____

Reporting party _____
(Name) (Title)

Name of plaintiff/petitioner(s)

Plaintiff/petitioner's attorney
_____ Pro Se

Bar #

Name of defendant/respondent(s)

Defendant/respondent's attorney
_____ Pro Se

Bar #

RELIEF GRANTED (Check all
that apply)

- 1. ____ Ex Parte Relief
- 2. ____ Temporary Relief
- 3. ____ Final Relief

TYPE OF DISPOSITION

- 1. Dismissed Without Final Order
- A. ____ Divorce/Annulment/
Separate Maintenance

- A. ____ Voluntary (by parties)
 B. ____ Involuntary (by court)

2. ____ Pretrial Settlement
 3. ____ Judgment on the Pleadings
 4. ____ Summary Judgment
 5. ____ Trial

A. Bench Trial

B. Jury Trial

1. ____ Dismissal after jury selected
 2. ____ Settlement during trial
 3. ____ Judgment on Verdict
 4. ____ Directed Verdict or JNOV

ADR

1. Was mediation utilized?
 ____ Yes ____ No
 2. If yes, was it (check if applicable):
 ____ court annexed?

- B. ____ Child Custody
 (i) Parenting plan included? ____ Yes ____ No

- (ii) Custodial arrangement:
 ____ Joint custody
 ____ Joint legal custody
 ____ Joint physical custody
 ____ Sole custody
 to: _____

- (iii) Fourteen year old made parental selection? ____ Yes ____ No

- C. Visitation or parenting time
 Approximate percentage of parenting time per year (or number of days) for: ____ Mother ____ Father
 Parenting time was contested? ____ Yes ____ No

D. ____ Child Support

- (i) Forms attached? ____ Yes ____ No

E. ____ Legitimation/
 Paternity

F. ____ Alimony

G. ____ Contempt

H. ____ Equitable Division

I. ____ Protective Order

- Finding of family violence? ____ Yes ____ No

_____ court mandated?

3. Was there an agreement to binding arbitration?

_____ Yes _____ No

If yes, what matters were subject to binding arbitration?

_____ Child custody

_____ Visitation or Parenting Time

_____ Parenting Plan

J. _____ Adoption

K. Attorney's fees?

_____ Yes _____ No

If yes, in what amount: \$_____ and to whom: _____

L. Other (specify) _____

4. _____ Dismissed prior to granting of relief.

(Code 1981, § 9-11-133, enacted by Ga. L. 2000, p. 850, § 3; Ga. L. 2007, p. 554, § 4/HB 369; Ga. L. 2010, p. 878, § 9/HB 1387.)

The 2007 amendment, effective January 1, 2008, rewrote subsections (c) and (e).

The 2010 amendment, effective June 3, 2010, part of an Act to revise, modernize, and correct the Code, substituted “, and (e) of this Code section or” for “and (e) or” in the first sentence of subsection (a).

Editor’s notes. — Ga. L. 2007, p. 554, § 1, not codified by the General Assembly, provides: “The General Assembly of Georgia declares that it is the policy of this state to assure that minor children have

frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage or relationship.”

Ga. L. 2007, p. 554, § 8, not codified by the General Assembly, provides that the 2007 amendment shall apply to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

JUDICIAL DECISIONS

Cited in GMC Group, Inc. v. Harsco Corp., 293 Ga. App. 707, 667 S.E.2d 916 (2008); Batesville Casket Co. v. Watkins

Mortuary, Inc., 293 Ga. App. 854, 668 S.E.2d 476 (2008).

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CHAPTER 12

VERDICT AND JUDGMENT

Article 4
Judgment Liens

Sec.
9-12-81. General execution docket;

when money judgment in county of defendant's residence creates lien against third parties without notice.

ARTICLE 1

GENERAL PROVISIONS

9-12-1. What verdict to cover.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 15 Am. Jur. Pleading and Practice Forms, Judges, § 80.

9-12-4. Verdicts to be construed reasonably; when avoided.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Cited in Hewitt Assocs., LLC v. Rollins, Inc., 308 Ga. App. 848, 708 S.E.2d 697 (2011).

9-12-5. Verdict may be molded.

JUDICIAL DECISIONS

Damage award could not be “molded.”

Trial court did not err by refusing to enter a judgment molding with a jury's verdict to correct an alleged illegality and inconsistency in the damages award because under O.C.G.A. § 9-12-7 the trial court had no authority to mold the verdict since an increase in damages was a matter of substance, not mere form; a plumbing contractor was not without a potential remedy if the contractor believed that the jury's verdict was incorrect because, after the return of the verdict but before the

dispersal of the jury, the plumbing contractor could have argued that the jury's damage award was illegal and internally inconsistent and could have requested the trial court to give additional instructions and permit the jury to consider the matter again, and alternatively, after the jury was dispersed, the plumbing contractor could have asked for a new trial on the issue of damages or to conditionally grant a new trial under the court's power of additur under O.C.G.A. § 51-12-12. Gill Plumbing Co. v. Jimenez, 310 Ga. App. 863, 714 S.E.2d 342 (2011), cert. denied,

No. S11C1826, 2011 Ga. LEXIS 966 (Ga. 2011).

9-12-7. Amendment of verdict — After dispersal of jury.

JUDICIAL DECISIONS

Verdict not to be amended after received and recorded.

Under O.C.G.A. § 9-12-7, a verdict could be amended in mere matter of form after the jury has dispersed; however, after a verdict was received and recorded and the jury has dispersed, it could not be amended in matter of substance either by what the jurors say they intended to find or otherwise. *Wilkinson v. State*, 283 Ga. App. 213, 641 S.E.2d 189 (2006).

Damage award could not be amended.

Trial court did not err by refusing to enter a judgment molding with a jury's verdict to correct an alleged illegality and inconsistency in the damages award because under O.C.G.A. § 9-12-7 the trial court had no authority to mold the verdict since an increase in damages was a matter of substance, not mere form; a plumbing contractor was not without a potential

remedy if the contractor believed that the jury's verdict was incorrect because, after the return of the verdict but before the dispersal of the jury, the plumbing contractor could have argued that the jury's damage award was illegal and internally inconsistent and could have requested the trial court to give additional instructions and permit the jury to consider the matter again, and alternatively, after the jury was dispersed, the plumbing contractor could have asked for a new trial on the issue of damages or to conditionally grant a new trial under the court's power of additur under O.C.G.A. § 51-12-12. *Gill Plumbing Co. v. Jimenez*, 310 Ga. App. 863, 714 S.E.2d 342 (2011), cert. denied, No. S11C1826, 2011 Ga. LEXIS 966 (Ga. 2011).

Cited in *Surles v. Cornell Corr. of Cal., Inc.*, 290 Ga. App. 260, 659 S.E.2d 683 (2008).

9-12-8. Amendment of verdict — Where part illegal.

JUDICIAL DECISIONS

Illegal award of attorney's fees and expenses. — Ancillary award of attorney fees and expenses in favor of a seller was ordered struck, pursuant to O.C.G.A. § 9-12-8, as: (1) the jury failed to find the buyers liable on the seller's underlying

substantive claims; (2) said award was based on O.C.G.A. § 13-6-11, not O.C.G.A. § 10-5-14; and, as a result, (3) the lack of a damages award in favor of the seller did not support the same. *Davis v. Johnson*, 280 Ga. App. 318, 634 S.E.2d 108 (2006).

9-12-9. Judgment to conform to verdict.

JUDICIAL DECISIONS

Judgment must follow true meaning and intent, etc.

Trial court erred by entering judgment on the jury's first verdict in a property owner's action for trespass and nuisance because the trial court had the authority and duty to instruct the jury to reconsider the verdict once a substantial error in the

charge was discovered even though the owner had not objected to the trial court's actions, and the charges and the verdict form created substantial uncertainty about the meaning of the jury's initial decision; the initial failure to charge on O.C.G.A. § 51-12-33(g) was harmful because the jury's initial decision showed an

intent to reduce the owner's award by only 50 percent, not 100 percent, but once the jury was fully instructed, the jury confirmed that intent in the second verdict, and the trial court was required to enter

judgment in accordance with that intent. *Bailey v. Annistown Rd. Baptist Church, Inc.*, 301 Ga. App. 677, 689 S.E.2d 62 (2009), cert. denied, No. S10C0669, 2010 Ga. LEXIS 468 (Ga. 2010).

9-12-10. Judgment for principal and interest.

JUDICIAL DECISIONS

Post-judgment interest O.C.G.A. § 13-6-11. — Trial court properly excluded an award of pre-judgment interest in calculating the amount of post-judgment interest and properly ap-

plied post-judgment interest to the award of attorney fees under O.C.G.A. § 13-6-11. *Davis v. Whitford Props.*, 282 Ga. App. 143, 637 S.E.2d 849 (2006).

9-12-14. Amendment of judgment to conform to verdict.

JUDICIAL DECISIONS

Claim not raised before trial court could not be raised for first time on appeal. — The trial court properly denied a motion to correct a judgment entered against two debtors and their guarantors, five years and eight months after the expiration of the term of court in which the judgment was entered, as they failed to show any entitlement to relief or exception as to why they could not have timely

sought the relief requested, and the debtors and their guarantors failed to raise a claim regarding O.C.G.A. § 9-12-14 in the court below, so it was not properly before the court. *De La Reza v. Osprey Capital, LLC*, 287 Ga. App. 196, 651 S.E.2d 97 (2007), cert. denied, 2007 Ga. LEXIS 819 (Ga. 2007).

Cited in *Taylor v. Peachbelt Props.*, 293 Ga. App. 335, 667 S.E.2d 117 (2008).

9-12-15. Judgment aided by verdict or amendable not set aside.

JUDICIAL DECISIONS

ANALYSIS

SPECIFIC APPLICATION

Specific Application

Judgment not set aside where defects amendable.

An order of forfeiture was not set aside

pursuant to O.C.G.A. § 9-12-15 as the failure to verify a petition was an amendable defect. *McDowell v. State of Ga.*, 290 Ga. App. 538, 660 S.E.2d 24 (2008).

9-12-16. Absent jurisdiction, judgment a nullity.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

JURISDICTION

1. IN GENERAL

General Consideration

Proper judgment not subject to attack.

The trial court properly dismissed a business' contribution action, filed pursuant to O.C.G.A. § 51-12-32, on subject matter jurisdiction grounds, as: (1) its finding that the business was the sole tortfeasor barred the action; (2) that finding was not void; (3) no appeal was taken from that finding; and (4) the suit amounted to an improper collateral attack on the default judgment entered against the business. *State Auto Mut. Ins. Co. v. Relocation & Corporate Hous. Servs.*, 287 Ga. App. 575, 651 S.E.2d 829 (2007), cert. denied, 2008 Ga. LEXIS 163 (Ga. 2008).

Jurisdiction

Res judicata. — Trial court erred in granting a limited liability company summary judgment in the company's ejectment action against a property owner on the ground of res judicata under O.C.G.A. § 9-12-40 because there remained a question of fact regarding whether the owner was a party to the prior action; the owner asserted and presented affidavit evidence supporting the claim that the trial court in the quiet title action lacked personal jurisdiction over the owner, thus creating a genuine issue of material fact regarding whether the owner was a party to the earlier litigation. *James v. Intown Ven-*

tures, LLC, No. S11A1705, 2012 Ga. LEXIS 194 (Feb. 27, 2012).

1. In General

Foreclosure judgment as to car. —

Failure to provide a corporation that was the original owner of a car with notice of a foreclosure proceeding involving the car was a due process violation that was tantamount to a lack of personal jurisdiction; thus, the foreclosure judgment was void under O.C.G.A. § 9-12-16. *Mitsubishi Motors Credit of Am., Inc. v. Sheridan*, 286 Ga. App. 791, 650 S.E.2d 357 (2007), cert. denied, No. S07C1842, 2007 Ga. LEXIS 751 (Ga. 2007).

Section inapplicable where judgment at issue was not a void judgment. — The trial court properly denied a motion to correct a judgment entered against two debtors and their guarantors, five years and eight months after the expiration of the term of court in which the judgment was entered, as they failed to show any entitlement to relief or exception as to why they could not have timely sought the relief requested, and O.C.G.A. § 9-12-16 did not apply because there was no issue regarding the trial court's original jurisdiction and because the judgment at issue was not a void judgment. *De La Reza v. Osprey Capital, LLC*, 287 Ga. App. 196, 651 S.E.2d 97 (2007), cert. denied, 2007 Ga. LEXIS 819 (Ga. 2007).

9-12-19. Judgment suspended by appeal.

JUDICIAL DECISIONS

Cited in *Amstead v. McFarland*, 287 Ga. App. 135, 650 S.E.2d 737 (2007).

ARTICLE 2

EFFECT OF JUDGMENTS

9-12-40. Judgment conclusive between which persons and on what issues.

Law reviews. — For survey article on construction law, see 60 *Mercer L. Rev.* 59 (2008).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
 SAME PARTIES AND PRIVIES
 RES JUDICATA
 ESTOPPEL BY JUDGMENT

General Consideration

Effect of stare decisis.

In plaintiff consumer's Fair Debt Collection Practices Act action against defendant collection attorney, where the consumer's counsel presented to the court two unpublished opinions from Georgia trial courts as supporting an argument that the collection attorney's state court deficiency action was barred by the statute of limitations, those unpublished opinions were not persuasive authority. *Almand v. Reynolds & Robin, P.C.*, 485 F. Supp. 2d 1361 (M.D. Ga. 2007).

Motion to set aside judgment not barred.

Superior court abused the court's discretion in denying a city's motion to set aside a judgment granting a police officer's demand for judgment on the Workers' Compensation Board's award because any earlier trial court orders were subject to a proper motion to set aside pursuant to O.C.G.A. § 9-12-40; the city was authorized to move to set aside the superior court's order granting the demand for judgment on the Board's award on the ground of mistake under O.C.G.A. § 9-11-60(d)(2). *City of Atlanta v. Holder*, 309 Ga. App. 811, 711 S.E.2d 332 (2011).

Cited in *Dalton Paving & Constr., Inc. v. South Green Constr. of Ga., Inc.*, 284 Ga. App. 506, 643 S.E.2d 754 (2007); *Walker v. Walker*, 293 Ga. App. 872, 668 S.E.2d 330 (2008); *QoS Networks Ltd. v. Warburg Pincus & Co.*, 294 Ga. App. 528, 669 S.E.2d 536 (2008); *Akridge v. Silva*, 298 Ga. App. 862, 681 S.E.2d 667 (2009); *Jones v. Unified Gov't of Athens-Clarke County*, 312 Ga. App. 214, 718 S.E.2d 74 (2011).

Same Parties and Privies

Who constitutes a "party".

Debtor's transfer of real property to the debtor's wife, a default judgment in a

lawsuit, which the trustee claimed rendered the debtor insolvent, in which the wife did not participate and which was filed after the transfer did not prove the debtor's insolvency at the time of the transfer for purposes of former O.C.G.A. § 18-2-22(3); the wife's status as the debtor's wife, standing alone, did not establish privity with the debtor, and the judgment against the debtor did not bind the wife. *Thurmond v. Turner (In re Turner)*, No. 00-72597-PWB, 2006 Bankr. LEXIS 2745 (Bankr. N.D. Ga. Sept. 19, 2006).

Attorney's lien in divorce case. — A former spouse's action to remove an attorney's lien under O.C.G.A. § 15-19-14 was barred by collateral estoppel under O.C.G.A. § 9-12-40. The issue of the lien had been fully litigated and decided in a divorce action in which the attorney represented the other spouse, and for purposes of recovering on the lien, the attorney was the other spouse's privy. *Ruth v. Herrmann*, 291 Ga. App. 399, 662 S.E.2d 726 (2008).

In a former client's suit seeking to remove an attorney's lien obtained against the former's clients marital property, a trial court properly granted summary judgment to the attorney since the propriety of the lien had already been litigated in the divorce action and the former client never appealed or challenged that judgment and an emergency motion to have the lien removed was denied. *Ruth v. Herrmann*, 291 Ga. App. 399, 662 S.E.2d 726 (May 2, 2008).

Tort action brought after exceptions to condemnation filed. — When a limited liability company brought a tort action against a county industrial development authority after filing an exception to a special master's award in a condemnation proceeding, the trial court properly dismissed the tort action under O.C.G.A. §§ 9-2-5(a) and 9-12-40. In both the condemnation action and the tort action, the

company sought a monetary award on the ground that the condemnation rendered its contract a nullity and that the condemnation action was brought in bad faith. *Coastal Water & Sewerage Co. v. Effingham County Indus. Dev. Auth.*, 288 Ga. App. 422, 654 S.E.2d 236 (2007).

Res Judicata

Record on appeal incomplete. —

Trial court's order granting summary judgment to a former wife on claims by a former husband and his corporate entities that the wife stole funds in 2006 was vacated and remanded for the trial court to consider the issue of res judicata in the first instance because the claims were not actually litigated and determined in the prior contempt action, and the record on appeal was incomplete with regard to those claims; while the final judgment and decree of divorce indicated that the settlement agreement between the wife and husband addressed the division of property, the copy of the settlement agreement included in the record on appeal as part of the parties' record appendix was missing the second page, which apparently contained the property-related provisions, and it was unclear from the record whether the trial court, in resolving the wife's motion for summary judgment, had a complete copy of the settlement agreement before the court or was likewise missing the second page. *Ga. Neurology & Rehab., P.C. v. Hiller*, 310 Ga. App. 202, 712 S.E.2d 611 (2011).

Identity of cause of action.

After the appeals court found that both the magistrate action and the action on appeal concerned a condominium association's failure to maintain the condominium complex in accordance with its by-laws and standards, and a claim for injunctive relief, because any related claim for injunctive relief later filed against the association could have been asserted before the magistrate, res judicata applied to the related claim, and the fact that magistrate court lacked subject matter jurisdiction to provide equitable relief was immaterial. *Green v. Bd. of Dirs. of Park Cliff Unit Owners Ass'n*, 279 Ga. App. 567, 631 S.E.2d 769 (2006).

Adjudication on the merits.

Because a commercial landlord had dismissed its prior dispossession action against a tenant upon payment by the tenant pursuant to a settlement of the amount due and owing and such dismissal did not indicate that it was with prejudice, it was deemed without prejudice and was accordingly not an adjudication on the merits pursuant to O.C.G.A. § 9-11-41(b); accordingly, it was error for the trial court to have barred the landlord's claim for common area maintenance charges in the landlord's second action on the ground of res judicata, as the requirement of a previous adjudication on the merits of the claim was not met pursuant to O.C.G.A. § 9-12-40. *Rafizadeh v. KR Snellville, LLC*, 280 Ga. App. 613, 634 S.E.2d 406 (2006).

A dismissal of a complaint for want of prosecution was not an adjudication on the merits; thus, collateral estoppel and res judicata did not bar a subsequent complaint. *Valdez v. R. Constr., Inc.*, 285 Ga. App. 373, 646 S.E.2d 329 (2007).

Because a prior order entered in a suit between a payor and a payee was a final adjudication of the payee's quantum meruit claim, and the payee did not appeal from that aspect of the order, said order acted as res judicata and could not be raised again in the instant suit. *ChoicePoint Servs. v. Hiers*, 284 Ga. App. 640, 644 S.E.2d 456 (2007), cert. denied, 2007 Ga. LEXIS 499 (Ga. 2007).

In an action by a client against the client's former attorney, the client was estopped by res judicata from seeking further judicial review of a 2005 order; the client filed an application for discretionary review of the 2005 order, which the Supreme Court of Georgia denied on its merits. *Hook v. Bergen*, 286 Ga. App. 258, 649 S.E.2d 313 (2007), cert. denied, 2007 Ga. LEXIS 697 (Ga. 2007).

Trial court did not err in entering summary judgment in favor of a grantor's grandsons in an action filed by the grantor's wife, daughter, and granddaughter challenging the validity of a quitclaim deed because res judicata compelled summary judgment on the counts alleging cloud on title, undue influence, and mistake of fact since there was an identity of the parties, and a decision of the court of

appeals in a prior appeal upholding the trial court's grant of summary judgment constituted an adjudication on the merits; the causes of action raised in the amended complaint were matters put in issue or which under the rules of law could have been put in issue in the original complaint. *Smith v. Lockridge*, 288 Ga. 180, 702 S.E.2d 858 (2010).

Opportunity to litigate issues in prior suit.

Buyer had no separate right to counterclaims which the buyer had asserted in a prior suit since the buyer had filed bankruptcy since the time the counterclaims were asserted; the counterclaims thus belonged to the buyer's bankruptcy estate, and so the bankruptcy trustee was authorized to dismiss them; *res judicata* barred the buyer from asserting the same claims in a later suit based on the dismissal of the counterclaims in the prior suit by the bankruptcy trustee. *Lee v. Owenby & Assocs.*, 279 Ga. App. 446, 631 S.E.2d 478 (2006).

Superior court properly upheld a second ALJ's ruling that an employer was foreclosed from raising a claim for a credit for 20 weeks of wages already paid to the claimant, under O.C.G.A. § 34-9-243, as the employer was entitled to raise the issue no later than ten days prior to the original compensation hearing, and said issue could and should have been adjudicated, but was not, making it *res judicata*. *Vought Aircraft Indus. v. Faulds*, 281 Ga. App. 338, 636 S.E.2d 75 (2006).

Claim by a company for fraud against a debtor brought for the first time in an adversary proceeding was barred by the doctrine of *res judicata* because the claim could have been brought in an earlier district court proceeding involving the same parties and the same facts. *Omega Cotton Co. v. Sutton (In re Sutton)*, No. 07-06006, 2008 Bankr. LEXIS 2593 (Bankr. M.D. Ga. Oct. 2, 2008).

Doctrine of *res judicata*, O.C.G.A. § 9-12-40, did not preclude a wife from bringing an action for damages based on her former husband's breach of a settlement agreement that had been incorporated into a court order because such a claim was separate and apart from a contempt action she brought based on his

violation of the order. *Jacob-Hopkins v. Jacob*, 304 Ga. App. 604, 697 S.E.2d 284 (2010).

Identity of parties.

Trial court erred in granting a limited liability company summary judgment in the company's ejectment action against a property owner on the ground of *res judicata* under O.C.G.A. § 9-12-40 because there remained a question of fact regarding whether the owner was a party to the prior action; the owner asserted and presented affidavit evidence supporting the claim that the trial court in the quiet title action lacked personal jurisdiction over the owner, thus creating a genuine issue of material fact regarding whether the owner was a party to the earlier litigation. *James v. Intown Ventures, LLC*, No. S11A1705, 2012 Ga. LEXIS 194 (Feb. 27, 2012).

Subject matter not identical in bank's action to recover. — *Res judicata* did not bar a bank's action against guarantors to recover the outstanding balances owed on promissory notes a development company executed because the subject matters in the bank's action and an action condominium owners filed against the company and the bank, which filed a third-party-complaint against the guarantors, were not identical; the owners' action concerned the company's breach of the company's obligations under mortgage documents, which triggered the guarantors' obligation to indemnify the bank for the cost of the litigation, and the bank's action concerned the guarantors' breach of their contractual obligation to repay the company's debt. *Baxter v. Fairfield Fin. Servs.*, 307 Ga. App. 286, 704 S.E.2d 423 (2010).

Different legal theory to recover for same wrong not permitted.

Despite a payee's argument that a reformation claim could not have previously been filed because neither party foresaw that a contract claim could have been disposed of as it was, the argument was rejected as spurious, and because this argument ignored the fact that the payee filed a prior quantum meruit claim, which was predicated on the lack of an enforceable contract; hence, the payor obviously anticipated that the contract might not be

entirely enforceable, and having done so, could have recognized the need to bring a reformation claim in the earlier action. *ChoicePoint Servs. v. Hiers*, 284 Ga. App. 640, 644 S.E.2d 456 (2007), cert. denied, 2007 Ga. LEXIS 499 (Ga. 2007).

State court's disposition of federal constitutional questions.

In a 42 U.S.C. § 1983 case arising from a traffic accident in which a driver had previously filed a state case, a federal district court did not err by granting summary judgment on the driver's claims on the basis of *res judicata* under O.C.G.A. § 9-12-40. The state court had issued a decision on the merits of the driver's claims, the driver conceded that the state court was a court of competent jurisdiction that could have decided the § 1983 claims, and the driver's contention that a litigant was not required to assert federal claims in state court was without merit. *Endsley v. City of Macon*, No. 08-13279, 2008 U.S. App. LEXIS 24003 (11th Cir. Nov. 20, 2008) (Unpublished).

Relationship of claims in state action to prior federal action.

Trial court did not err in granting summary judgment to a city in a police officer's suit on the basis that, pursuant to the doctrine of *res judicata*, a prior federal action by the police officer barred the police officer's claims regarding the city's failure to promote the police officer on two occasions in 2004 promotions; however, the police officer's claims based on the failure to promote in December 2005 and November 2006 were not barred by *res judicata* because the city did not meet the city's burden of affirmatively establishing that the police officer could have raised these claims, which were based on separate events, in the federal case. Thus, the trial court erred in granting summary judgment to the city as to the 2005 and 2006 promotions. *Neely v. City of Riverdale*, 298 Ga. App. 884, 681 S.E.2d 677 (2009), cert. denied, No. S09C1925, 2010 Ga. LEXIS 28 (Ga. 2010).

Res judicata applied.

The appeals court agreed with the trial court that the doctrine of *res judicata* barred the negligence and breach of contract claims asserted by two property owners against a contractor, as: (1) the

claims were essentially identical to the allegations in a counterclaim filed in a prior Cherokee County action; (2) the parties in the two cases were identical for purposes of *res judicata*; and (3) the Cherokee County suit resulted in an adjudication on the merits. *Perrett v. Sumner*, 286 Ga. App. 379, 649 S.E.2d 545 (2007).

In a 42 U.S.C. § 1983 case arising from a traffic accident in which the driver had filed an earlier state case that was decided on the merits, the driver's federal claims were barred by *res judicata* under O.C.G.A. § 9-12-40 even though the driver had added a police chief and deleted a police department from the federal case. The driver's claims against the police chief were predicated on the same operative facts relating to the traffic accident, and the driver could not avoid the application of *res judicata* by adding new parties. *Endsley v. City of Macon*, No. 08-13279, 2008 U.S. App. LEXIS 24003 (11th Cir. Nov. 20, 2008) (Unpublished).

Renter's suit asserting that the renter's due process rights were violated in connection with the renter's eviction after a bank's foreclosure on the property the renter was leasing was barred under the doctrine of *res judicata* pursuant to 28 U.S.C. § 1738 and O.C.G.A. § 9-12-40 because the renter had already filed numerous suits against the bank and the other defendants, the claims in the instant suit arose out of the same nucleus of operative fact as the claims asserted in the earlier suits, the suits involved the same parties, and the decisions of the state and federal courts that ruled in those actions constituted final judgments on the merits. *Vereen v. Everett*, No. 1:08-CV-1969-RWS, 2009 U.S. Dist. LEXIS 27302 (N.D. Ga. Mar. 31, 2009).

Plaintiffs' claims against a limited liability company (LLC) and the company's owners were *res judicata* and were barred by O.C.G.A. § 9-12-40 because the claims involved the same subject matter as the claims the plaintiffs raised in their second civil action against the LLC and the owners, the temporary termination of their water supply; thus, the LLC was entitled to summary judgment. *Adams v. Tricord, LLC*, 299 Ga. App. 310, 682 S.E.2d 588 (2009).

Application to criminal cases.

When a defendant filed a pro se petition for habeas corpus while the defendant's request to file an out-of-time motion for a new trial was pending, the defendant's decision to go forward with the habeas action precluded the defendant under O.C.G.A. § 9-12-40 from later relitigating an ineffective assistance claim at the hearing on the motion for a new trial. *Spiller v. State*, 282 Ga. 351, 647 S.E.2d 64 (2007), cert. denied, 552 U.S. 1079, 128 S. Ct. 812, 169 L. Ed. 2d 612 (2007).

Application to probate proceedings. — Trial court erred by granting summary judgment to an estate executor in a suit asserting fraud and other claims brought by two siblings as the trial court incorrectly determined that the privileges set forth in O.C.G.A. §§ 51-5-7(2) and 51-5-8 applied to the fraud claims and neither collateral estoppel nor res judicata barred the action since a prior probate court proceeding did not involve the same issues. Further, the probate court would have had no jurisdiction over the fraud and intentional interference with a gift claims. *Morrison v. Morrison*, 284 Ga. 112, 663 S.E.2d 714 (2008).

Court of appeals did not err in holding that res judicata barred a daughter's complaint for breach of contract against a widow because the relevant facts pled in the daughter's prior attempt to set aside the year's support granted to the widow on the basis of fraud were identical to those the daughter alleged in support of the breach of contract claim; the daughter's fraud claim was determined on the merits on appeal to the superior court, and the daughter had a full and fair opportunity to have litigated any related claims against the widow in the action the daughter initially filed in the probate court. *Crowe v. Elder*, 290 Ga. 686, 723 S.E.2d 428 (2012).

Arbitration proceedings.

Court of Appeals erroneously held that the arbitrator, and not the court, should have decided whether arbitration was barred by res judicata, as: (1) no presumption existed that an arbitrator was in a better position than a court to apply a legal doctrine such as res judicata; (2) the parties did not expressly reserve the issue

for arbitration; and (3) there was no presumption under Georgia law that the application of a procedural bar such as res judicata was a matter to be determined exclusively by an arbitrator. *Bryan County v. Yates Paving & Grading Co.*, 281 Ga. 361, 638 S.E.2d 302 (2006).

Claims arising out of a county's termination of a construction contract that the contractor sought to have arbitrated were barred by the res judicata effect of a previous arbitration; by agreeing to defer a claim for lost income and then moving to confirm the arbitration award, the contractor waived the lost income claims. *Yates Paving & Grading Co. v. Bryan County*, 287 Ga. App. 802, 652 S.E.2d 851 (2007).

Judgment not res judicata.

Trial court did not err in ruling for a creditor in the creditor's action pursuant to O.C.G.A. § 44-14-231 to foreclose on personal property and to recover monies lent and unpaid because the doctrine of res judicata did not apply when the merits of the creditor's claims for foreclosure and monies lent had not been previously adjudicated by a court of competent jurisdiction; the issue before an administrative law judge (ALJ) in the Office of State Administrative Hearing was limited to whether the Georgia Department of Revenue acted properly in cancelling the creditor's certificate of title to a vehicle, and in denying the creditor's motion for reconsideration, the ALJ specifically stated that the issue of whether the creditor would be reflected on the certificate of title to the vehicle as lienholder was not before the court. *Allen v. Santana*, 303 Ga. App. 844, 695 S.E.2d 314 (2010).

No res judicata where earlier order found only that service had not been perfected. — Res judicata did not apply because an earlier order had merely found that service had not been perfected; there was no adjudication as to whether the present action was void or whether the statute of limitations had run. *Wyatt v. House*, 287 Ga. App. 739, 652 S.E.2d 627 (2007).

Borrowers' fraud and conversion claims not barred by res judicata. — Bank assigned a note and a deed to secure debt to the borrowers' friend, who as-

signed them to a third party, which foreclosed on the borrowers' home and filed a successful dispossessory action against them. The borrowers' fraud and conversion claims against the bank were not barred by *res judicata* under OCGA § 9-12-40 or collateral estoppel as the bank was not a party to the party involved in the dispossessory action. *Dennis v. First Nat'l Bank of the S.*, 293 Ga. App. 890, 668 S.E.2d 479 (2008).

Failure to appeal a prior judgment rendered judgment binding. — Homeowners' complaint against a homeowners' association was properly dismissed for failure to state a claim because the complaint challenged a prior judgment obtained by the association against the homeowners from which the homeowners did not appeal. That prior judgment was therefore *res judicata*. *Laosebikan v. Lakemont Cmty. Ass'n*, 302 Ga. App. 220, 690 S.E.2d 505 (2010).

Estoppel by Judgment

Issue barred by collateral estoppel.

Denial of a sister's and an executrix's motions for a judgment notwithstanding the verdict were reversed as a constructive trust could not be imposed over the proceeds of a condemnation since: (1) a

mother did not make any agreement with her children regarding the quitclaim deeds or the proceeds of the condemnation; (2) the documents signed by the siblings were unequivocal and unrestricted; (3) the mother did not make any promise with the intent not to carry it out; (4) there was nothing to indicate that when the mother obtained a certificate of deposit and opened a money market account in her and the executrix's and the sister's names as joint tenants with right of survivorship, she meant to do anything other than that; and (5) the siblings did not raise the issue of a constructive trust in the condemnation proceedings and were collaterally estopped from raising the issue in a later action. *Jenkins v. Jenkins*, 281 Ga. App. 756, 637 S.E.2d 56 (2006), cert. denied, 2007 Ga. LEXIS 87 (Ga. 2007).

Collateral estoppel applied to bar the debtor from relitigating the issue of a default judgment for the debtor's liability for fraud, wrongful eviction, and punitive damages pursuant to 11 U.S.C. § 523(a)(2) and (6), as well as pursuant to O.C.G.A. § 9-12-40; thus, judgment in the amount of \$222,833 was granted. *Hebbard v. Camacho (In re Camacho)*, 411 B.R. 496 (Bankr. S.D. Ga. 2009).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice

Forms. — 15 Am. Jur. Pleading and Practice Forms, Judgments, §§ 55, 273.

9-12-41. Effect of judgment in rem.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice

Forms. — 15 Am. Jur. Pleading and Practice Forms, Judgments, § 93.

9-12-42. Judgment no bar absent decision on merits.

JUDICIAL DECISIONS

ANALYSIS

DISMISSED ACTIONS

Dismissed Actions

Dismissal for lack of prosecution.

A dismissal of a complaint for want of prosecution was not an adjudication on

the merits; thus, collateral estoppel and res judicata did not bar a subsequent complaint. *Valdez v. R. Constr., Inc.*, 285 Ga. App. 373, 646 S.E.2d 329 (2007).

ARTICLE 3

DORMANCY AND REVIVAL OF JUDGMENTS

9-12-60. When judgment becomes dormant; how dormancy prevented; docketing; applicability.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Action time-barred. — Trial court properly found that an action to enforce a Florida judgment entered against a judgment debtor was time-barred under Georgia law, granting the judgment debtor's motion the stay enforcement of said judgment, as the statute of limitations on enforcement of the Florida judgment had run under the law of Georgia, the receiving state, when viewed from the date of rendition of the judgment in the State of Florida, the state in which the judgment originated; moreover, to run the Georgia time limitation from the date of the filing of the judgment rather than from the date of rendition of the judgment would be contrary to the language of the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., and of Georgia's dormancy-of-judgment and judgment-renewal statutes, O.C.G.A. §§ 9-12-60 and 9-12-61. *Corzo Trucking Corp. v. West*, 281 Ga. App. 361, 636 S.E.2d 39 (2006).

Corporation and two individuals could not enforce a 1985 Florida judgment, which was renewed in 2006, in Georgia pursuant to the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., because by their operation in tandem, O.C.G.A. §§ 9-12-60(a)(1) and 9-12-61 created a 10-year statute of limitation for the enforcement of Georgia judgments and O.C.G.A. § 9-12-132 did not allow a Flor-

ida judgment to have a longer life than a Georgia judgment. *Corzo Trucking Corp. v. West*, 296 Ga. App. 399, 674 S.E.2d 414 (2009).

Revival of dormant judgment in workers' compensation cases. — In an action wherein a workers' compensation claimant revived a lump-sum judgment of \$37,747.08 plus accrued interest, which had become dormant against an employer, the trial court properly refused to amend the 2006 judgment that revived it to provide for weekly disability payments as the term of court ended and, therefore, the trial court had no authority to amend or alter that 2006 judgment. However, the trial court should have issued a writ of execution for the payments that became due after July 27, 2000, as those payments had not become dormant. *Taylor v. Peachbelt Props.*, 293 Ga. App. 335, 667 S.E.2d 117 (2008).

Money prerequisite to application.

Portion of a divorce decree, which held that the former wife held shares of stock in a "resulting trust" for the former husband, was not dormant and could be enforced by the husband's estate because O.C.G.A. § 9-12-60 only applied to judgments for money. *Barker v. Whittington (In re Barker)*, No. 07-70036-WLH, 2010 Bankr. LEXIS 4005 (Bankr. N.D. Ga. Oct. 26, 2010).

A decree for alimony payable in installments, etc.

Portion of a divorce decree, which or-

dered the payment of \$12,500 per month for 120 months, was not dormant because each installment was a new judgment, and not all of the obligations were more than ten years old. *Barker v. Whittington* (In re *Barker*), No. 07-70036-WLH, 2010 Bankr. LEXIS 4005 (Bankr. N.D. Ga. Oct. 26, 2010).

Application to bankruptcy proceeding.

Debtor's objection to the creditor's amended proof of claim was sustained and the creditor's claim was allowed as general unsecured since: (1) the creditor admitted that over seven years elapsed since the judgment was recorded and that the state court judgment was dormant when the debtor filed for bankruptcy; (2) by stipulation of the parties, the judgment became dormant nearly one full year before the debtor sought bankruptcy relief; (3) because the debtor filed the bankruptcy petition after the seven-year period established by O.C.G.A. § 9-12-60 expired, the creditor's judgment lien was invalid and unenforceable on the filing date; (4) the automatic stay barred the creditor from renewing or reviving the

creditor's lien post-petition; and (5) relief from the stay would not have resurrected the creditor's secured status because the law was clear that the lien as revived attached only as of the date of the revival. *Beckham v. A & W Oil & Tire Co.* (In re *Beckham*), No. 03-10499, 2004 Bankr. LEXIS 1574 (Bankr. S.D. Ga. Sept. 15, 2004) (Unpublished).

Waiver of affirmative defense. — In an answer to the husband's motion for contempt, the wife did not raise dormancy as a defense to the obligation to comply with the provisions of the parties' 1988 divorce decree with regard to paying the husband a share of the marital home equity in the amount of \$22,000 after the wife remarried, therefore, the wife was deemed to have waived the affirmative defense; the reviewing court found that the wife only invoked O.C.G.A. § 9-12-60 after the trial court found that the wife was in contempt, when the wife filed post-judgment motions for new trial and to set aside, not when the wife answered the contempt motion. *Corvin v. Debter*, 281 Ga. 500, 639 S.E.2d 477 (2007).

Cited in *Sussman v. Sussman*, 301 Ga. App. 397, 687 S.E.2d 644 (2009).

9-12-61. Dormant judgments renewed by action or scire facias; time of renewal.

JUDICIAL DECISIONS

Foreign judgments.

Trial court properly found that an action to enforce a Florida judgment entered against a judgment debtor was time-barred under Georgia law, granting the judgment debtor's motion the stay enforcement of said judgment, as the statute of limitations on enforcement of the Florida judgment had run under the law of Georgia, the receiving state, when viewed from the date of rendition of the judgment in the state of Florida, the state in which the judgment originated; moreover, to run the Georgia time limitation from the date of the filing of the judgment rather than from the date of rendition of the judgment would be contrary to the language of the Uniform Enforcement of

Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., and of Georgia's dormancy-of-judgment and judgment-renewal statutes, O.C.G.A. §§ 9-12-60 and 9-12-61. *Corzo Trucking Corp. v. West*, 281 Ga. App. 361, 636 S.E.2d 39 (2006).

Corporation and two individuals could not enforce a 1985 Florida judgment, which was renewed in 2006, in Georgia pursuant to the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., because by their operation in tandem, O.C.G.A. §§ 9-12-60(a)(1) and 9-12-61 created a 10-year statute of limitation for the enforcement of Georgia judgments and O.C.G.A. § 9-12-132 did not allow a Florida judgment to have a

longer life than a Georgia judgment. *Corzo Trucking Corp. v. West*, 296 Ga. App. 399, 674 S.E.2d 414 (2009).

Writ should have been issued after revival of dormant judgment in workers' compensation case. — In an action wherein a workers' compensation claimant had revived a lump-sum judgment of \$37,747.08 plus accrued interest, which had become dormant against an employer, the trial court properly refused to amend the 2006 judgment that revived it to provide for weekly disability payments as the term of court ended and, therefore, the trial court had no authority to amend or alter that 2006 judgment. However, the trial court should have issued a writ of execution for the payments that became due after July 27, 2000, as those payment had not become dormant. *Taylor v. Peachbelt Props.*, 293 Ga. App. 335, 667 S.E.2d 117 (2008).

Application to bankruptcy proceeding. — Debtor's objection to the creditor's amended proof of claim was sustained and the creditor's claim was allowed as general unsecured where (1) the creditor admitted that over seven

years elapsed since the judgment was recorded and that the state court judgment was dormant when the debtor filed for bankruptcy, (2) by stipulation of the parties, the judgment became dormant nearly one full year before the debtor sought bankruptcy relief, (3) because the debtor filed the bankruptcy petition after the seven-year period established by O.C.G.A. § 9-12-60 expired, the creditor's judgment lien was invalid and unenforceable on the filing date, (4) the automatic stay barred the creditor from renewing or reviving its lien post-petition, and (5) relief from the stay would not have resurrected the creditor's secured status because the law was clear that the lien as revived attached only as of the date of the revival. *Beckham v. A & W Oil & Tire Co.* (In re *Beckham*), No. 03-10499, 2004 Bankr. LEXIS 1574 (Bankr. S.D. Ga. Sept. 15, 2004) (Unpublished).

Cited in *Sussman v. Sussman*, 301 Ga. App. 397, 687 S.E.2d 644 (2009); *Barker v. Whittington* (In re *Barker*), No. 07-70036-WLH, 2010 Bankr. LEXIS 4005 (Bankr. N.D. Ga. Oct. 26, 2010).

9-12-62. Nature of scire facias.

JUDICIAL DECISIONS

Lien revived by scire facias. — Lien revived by scire facias only attaches as of the date of the revival. *Beckham v. A & W Oil & Tire Co.* (In re *Beckham*), No.

03-10499, 2004 Bankr. LEXIS 1574 (Bankr. S.D. Ga. Sept. 15, 2004) (Unpublished).

9-12-66. Venue of action to renew judgment.

JUDICIAL DECISIONS

Cited in *Beckham v. A & W Oil & Tire Co.* (In re *Beckham*), No. 03-10499, 2004 Bankr. LEXIS 1574 (Bankr. S.D. Ga. Sept. 15, 2004).

ARTICLE 4

JUDGMENT LIENS

9-12-80. Equal dignity and binding effect of judgments.

JUDICIAL DECISIONS

Judgment lien on real property is perfected when recorded. — In determining that a debtor's transfer of a security interest in certain real property to a judgment creditor occurred for purposes of 11 U.S.C. § 547(b) when the creditor's judgment lien was recorded, the court applied O.C.G.A. § 9-12-86 because: (1) case law holding that an unrecorded deed had priority over a recorded judgment lien was limited to O.C.G.A. § 44-2-2 and did not prevent the application of § 9-12-86 in the instant case; (2) § 9-12-86 provided an exception to O.C.G.A. § 9-12-80's general rule that a creditor acquired a lien when judgment was entered; and (3) a trustee's imputed knowledge of a transfer was not relevant for purposes of 11 U.S.C. § 547.

Pettigrew v. Hoey Constr. Co. (In re NotJust Another CarWash, Inc.), No. 04-90859-MGD, 2007 Bankr. LEXIS 979 (Bankr. N.D. Ga. Feb. 15, 2007).

Homeowners association as judgment creditor entitled to file a lien. — Because a judgment debtor's personal property was automatically bound by a judgment as of the date a state court judgment was rendered, O.C.G.A. §§ 9-12-80 and 44-14-320(a)(2), a homeowners' association became a judgment creditor of the homeowners upon the entry of a state court judgment and was entitled to file a lien binding the homeowners' property. *Laosebikan v. Lakemont Cmty. Ass'n*, 302 Ga. App. 220, 690 S.E.2d 505 (2010).

9-12-81. General execution docket; when money judgment in county of defendant's residence creates lien against third parties without notice.

(a) The clerk of superior court of each county shall be required to keep a general execution docket in paper or electronic data base form.

(b) As against the interest of third parties acting in good faith and without notice who have acquired a transfer or lien binding the property of the defendant in judgment, no money judgment obtained within the county of the defendant's residence in any court of this state or federal court in this state shall create a lien upon the property of the defendant unless the execution issuing thereon is entered upon the execution docket. When the execution has been entered upon the docket, the lien shall date from such entry. (Ga. L. 1889, p. 106, § 2; Civil Code 1895, § 2779; Civil Code 1910, § 3321; Ga. L. 1921, p. 115, § 1; Code 1933, § 39-701; Ga. L. 1955, p. 425, § 1; Ga. L. 2012, p. 599, § 1-2/HB 665.)

The 2012 amendment, effective July 1, 2012, in subsection (a), deleted "the" preceding "superior court" near the begin-

ning, and added "in paper or electronic data base form" at the end.

JUDICIAL DECISIONS

As against the rights of third parties acting in good faith, etc.

In a declaratory judgment action brought by the purchasers of certain real property to remove a cloud from the purchasers' title asserted by a bank who had obtained a writ of fieri facias (the lien) against one of the sellers, the trial court erred by granting summary judgment to the bank and holding that the purchasers had a duty to inquire as to prior names used by that seller. The purchasers provided expert testimony that the lien using that seller's married name had not been recorded and, in turn, the bank failed to

present any evidence to dispute the affidavits of the purchasers' witnesses or to cite to any authority which imposed a duty on the purchasers or the purchasers' agents to investigate prior or alternative names of that seller when nothing occurred prior to or during the closing that created a duty to inquire and that seller had falsely sworn under oath that the property was not subject to any encumbrances or liens and that there were no outstanding judgments. *Gallagher v. Buckhead Cmty. Bank*, 299 Ga. App. 622, 683 S.E.2d 50 (2009), cert. denied, No. S09C2080, 2010 Ga. LEXIS 2 (Ga. 2010).

9-12-86. Recordation in county where located prerequisite to lien on land; Code section supplemental.

JUDICIAL DECISIONS

Recordation prerequisite applicable only to liens on real property.

In a declaratory judgment action brought by the purchasers of certain real property to remove a cloud from the purchaser's title asserted by a bank who had obtained a writ of fieri facias (the lien) against one of the sellers, the trial court erred by granting summary judgment to the bank and holding that the purchasers had a duty to inquire as to prior names used by that seller. The purchasers provided expert testimony that the lien using that seller's married name had not been recorded and, in turn, the bank failed to present any evidence to dispute the affidavits of the purchasers' witnesses or to cite to any authority which imposed a duty on the purchasers or the purchasers' agents to investigate prior or alternative names of that seller when nothing occurred prior to or during the closing that created a duty to inquire and that the seller had falsely sworn under oath that the property was not subject to any encumbrances or liens and that there were no outstanding judgments. *Gallagher v. Buckhead Cmty. Bank*, 299 Ga. App. 622, 683 S.E.2d 50 (2009), cert. denied, No. S09C2080, 2010 Ga. LEXIS 2 (Ga. 2010).

Georgia law determines when

transfer takes place for Bankruptcy Code, etc.

Under O.C.G.A. § 9-12-86, a creditor's judgment lien against a debtor's real property was not perfected for purposes of 11 U.S.C. § 547(b) until the lien was recorded, and because the lien was recorded within 90 days of the filing of the debtor's bankruptcy petition, a trustee was permitted to avoid the transfer of the security interest as a preference; the court declined to use its equitable powers under 11 U.S.C. § 105(a) to find that the transfer occurred outside the preference period because to do so would have circumvented the trustee's clear statutory authority to avoid preference transactions. *Pettigrew v. Hoey Constr. Co. (In re NotJust Another CarWash, Inc.)*, No. 04-90859-MGD, 2007 Bankr. LEXIS 979 (Bankr. N.D. Ga. Feb. 15, 2007).

In determining that a debtor's transfer of a security interest in certain real property to a judgment creditor occurred for purposes of 11 U.S.C. § 547(b) when the creditor's judgment lien was recorded, the court applied O.C.G.A. § 9-12-86 because: (1) case law holding that an unrecorded deed had priority over a recorded judgment lien was limited to O.C.G.A. § 44-2-2 and did not prevent the applica-

tion of § 9-12-86 in the instant case; (2) § 9-12-86 provided an exception to O.C.G.A. 9-12-80's general rule that a creditor acquired a lien when judgment was entered; and (3) a trustee's imputed knowledge of a transfer was not relevant

for purposes of 11 U.S.C. § 547. *Pettigrew v. Hoey Constr. Co. (In re NotJust Another CarWash, Inc.)*, No. 04-90859-MGD, 2007 Bankr. LEXIS 979 (Bankr. N.D. Ga. Feb. 15, 2007).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 15 Am. Jur. Pleading and Practice Forms, Judgments, § 18.

ARTICLE 6

ENFORCEMENT OF FOREIGN JUDGMENTS

9-12-130. Short title.

JUDICIAL DECISIONS

Action barred.

Trial court properly found that an action to enforce a Florida judgment entered against a judgment debtor was time-barred under Georgia law, granting the judgment debtor's motion the stay enforcement of said judgment, as the statute of limitations on enforcement of the Florida judgment had run under the law of Georgia, the receiving state, when viewed from the date of rendition of the judgment in the state of Florida, the state in which the judgment originated; moreover, to run the Georgia time limitation from the date of the filing of the judgment rather than from the date of rendition of the judgment would be contrary to the language of the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., and of Georgia's

dormancy-of-judgment and judgment-renewal statutes, O.C.G.A. §§ 9-12-60 and 9-12-61. *Corzo Trucking Corp. v. West*, 281 Ga. App. 361, 636 S.E.2d 39 (2006).

Failure to negate defense of lack of personal jurisdiction. — It was error to domesticate an Ohio judgment under O.C.G.A. § 9-12-130. The judgment creditor had not offered admissible evidence to make a prima facie showing that the judgment debtor transacted business in the state of Ohio as contemplated by Ohio's long-arm statute or that the judgment debtor purposely established contacts with Ohio; thus, it had failed to negate the judgment debtor's defense of lack of personal jurisdiction. *Std. Bldg. Co. v. Wallen Concept Glazing, Inc.*, 298 Ga. App. 443, 680 S.E.2d 527 (2009).

9-12-131. "Foreign judgment" defined.

JUDICIAL DECISIONS

Appeal. — Appeal of an order denying appellants' motion to vacate a foreign judgment was dismissed because appellants failed to follow the correct procedure for appealing the trial court's decision; appellants never filed a motion to set aside the judgment under O.C.G.A.

§ 9-11-60(d), which was the proper method for attacking a foreign judgment filed under the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq.; the underlying subject matter of appellants' motions was an attempt to set aside a judgment, and the

denial of appellants' motions was subject to discretionary appeal because the underlying subject matter generally controlled over the relief sought in determining the

proper procedure to follow to appeal. *Noaha, LLC v. Vista Antiques & Persian Rugs, Inc.*, 306 Ga. App. 323, 702 S.E.2d 660 (2010).

9-12-132. Filing of judgment; force and effect following filing.

JUDICIAL DECISIONS

Collateral attack on foreign judgment.

Because a trial court was required by O.C.G.A. §§ 9-11-60 and 9-12-132 to accord a foreign judgment full faith and credit if the judgment was proper under the law in which the judgment was rendered, the court erred in holding that Georgia law governed the filing of the debtors' answer in a New York case; the trial erred in granting a motion to set aside the judgment since the debtors were in default for failing to timely serve an answer upon counsel in accordance with N.Y. C.P.L.R. 320(a), 2103(b). *LeRoy Vill. Green Residential Health Care Facility, Inc. v. Downs*, 310 Ga. App. 754, 713 S.E.2d 728 (2011).

Stipulation for extension of time was not appearance. — Trial court erred in denying a corporation's motion to set aside a New Jersey judgment pursuant to O.C.G.A. § 9-12-132 because New Jersey lacked personal jurisdiction; a stipulation for an extension of time to answer the complaint filed with the New Jersey court did not constitute an appearance so as to submit the corporation to that court's jurisdiction. *Homeowners Mortg. of Am., Inc. v. Chase Home Fin., LLC*, 294 Ga. App. 153, 668 S.E.2d 561 (2008).

Stay of enforcement of foreign judgment proper. — Trial court properly stayed enforcement of an original South Carolina judgment under O.C.G.A. § 9-12-134 because an appeal was pending, and once the South Carolina appellate court issued a remittitur and the lower court entered a revised judgment, appellee properly filed the revised South Carolina judgment and moved to lift the stay, and once the revised South Carolina judgment was filed, that judgment, like the original, had the same effect as a Georgia judgment under O.C.G.A.

§ 9-12-132. The revised judgment had the same effect a Georgia judgment would have if the judgment had been revised in accordance with a remittitur received from a Georgia appellate court, and the stay was, therefore, properly lifted to allow enforcement of that revised judgment. *Noaha, LLC v. Vista Antiques & Persian Rugs, Inc.*, 306 Ga. App. 323, 702 S.E.2d 660 (2010).

Action time-barred. — Trial court properly found that an action to enforce a Florida judgment entered against a judgment debtor was time-barred under Georgia law, granting the judgment debtor's motion the stay enforcement of said judgment, as the statute of limitations on enforcement of the Florida judgment had run under the law of Georgia, the receiving state, when viewed from the date of rendition of the judgment in the state of Florida, the state in which the judgment originated; moreover, to run the Georgia time limitation from the date of the filing of the judgment rather than from the date of rendition of the judgment would be contrary to the language of the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., and of Georgia's dormancy-of-judgment and judgment-renewal statutes, O.C.G.A. §§ 9-12-60 and 9-12-61. *Corzo Trucking Corp. v. West*, 281 Ga. App. 361, 636 S.E.2d 39 (2006).

Corporation and two individuals could not enforce a 1985 Florida judgment, which was renewed in 2006, in Georgia pursuant to the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., because by their operation in tandem, O.C.G.A. §§ 9-12-60(a)(1) and 9-12-61 created a 10-year statute of limitation for the enforcement of Georgia judgments and O.C.G.A. § 9-12-132 did not allow a Flor-

ida judgment to have a longer life than a Georgia judgment. *Corzo Trucking Corp. v. West*, 296 Ga. App. 399, 674 S.E.2d 414 (2009).

Appeal.

Appeal of an order denying appellants' motion to vacate a foreign judgment was dismissed because appellants failed to follow the correct procedure for appealing the trial court's decision; appellants never filed a motion to set aside the judgment under O.C.G.A. § 9-11-60(d), which was the proper method for attacking a foreign

judgment under the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq.; the underlying subject matter of appellants' motions was an attempt to set aside a judgment, and the denial of appellants' motions was subject to discretionary appeal because the underlying subject matter generally controlled over the relief sought in determining the proper procedure to follow to appeal. *Noaha, LLC v. Vista Antiques & Persian Rugs, Inc.*, 306 Ga. App. 323, 702 S.E.2d 660 (2010).

9-12-134. Appeal or stay of foreign judgment; security for satisfaction.

JUDICIAL DECISIONS

Motion for stay. — Trial court properly found that an action to enforce a Florida judgment entered against a judgment debtor was time-barred under Georgia law, granting the judgment debtor's motion the stay enforcement of said judgment, as the statute of limitations on enforcement of the Florida judgment had run under the law of Georgia, the receiving state, when viewed from the date of rendition of the judgment in the state of Florida, the state in which the judgment originated; moreover, to run the Georgia time limitation from the date of the filing of the judgment rather than from the date of rendition of the judgment would be contrary to the language of the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., and of Georgia's dormancy-of-judgment and judgment-renewal statutes, O.C.G.A. §§ 9-12-60 and 9-12-61. *Corzo Trucking Corp. v. West*, 281 Ga. App. 361, 636 S.E.2d 39 (2006).

Stay of enforcement of foreign judgment proper. — Trial court properly stayed enforcement of an original South Carolina judgment under O.C.G.A. § 9-12-134 because an appeal was pending, and once the South Carolina appellate court issued a remittitur and the lower court entered a revised judgment, appellee properly filed the revised South Carolina judgment and moved to lift the stay, and once the revised South Carolina judgment was filed, the judgment, like the original, had the same effect as a Georgia judgment under O.C.G.A. § 9-12-132. The revised judgment had the same effect a Georgia judgment would have if the judgment had been revised in accordance with a remittitur received from a Georgia appellate court, and the stay was, therefore, properly lifted to allow enforcement of that revised judgment. *Noaha, LLC v. Vista Antiques & Persian Rugs, Inc.*, 306 Ga. App. 323, 702 S.E.2d 660 (2010).

CHAPTER 13

EXECUTIONS AND JUDICIAL SALES

ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For article, “Enforcing Commercial Real Estate Loan Guaranties,” see 15 (No. 2) Ga. State Bar J. 12 (2009).

9-13-3. Execution to follow judgment.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 15A Am. Jur. Pleading and Practice Forms, Judgments, § 434.

9-13-4. Judge may frame executions.

JUDICIAL DECISIONS

Writ should have been issued after revival of dormant judgment. — In an action wherein a workers’ compensation claimant had revived a lump-sum judgment of \$37,747.08 plus accrued interest, which had become dormant against an employer, the trial court properly refused to amend the 2006 judgment that revived it to provide for weekly disability pay-

ments as the term of court ended and, therefore, the trial court had no authority to amend or alter that 2006 judgment. However, the trial court should have issued a writ of execution for the payments that became due after July 27, 2000, as those payments had not become dormant. *Taylor v. Peachbelt Props.*, 293 Ga. App. 335, 667 S.E.2d 117 (2008).

9-13-12. Entry of levy on process.

JUDICIAL DECISIONS

Notice of levy no substitute for valid writ of execution. — When no valid levy occurs because of a defect in the writ of execution, the actual notice provided by the notice of levy issued pursuant to O.C.G.A. § 48-3-9 cannot serve as a seizure of the property so as to cure the defect in the writ of execution. *Powers v. CDSaxton Props., LLC*, 285 Ga. 303, 676 S.E.2d 186 (2009).

Tax sale invalid. — As a county tax commissioner’s fieri facias on a parcel of property was defective because no entry of levy was made thereon as required by O.C.G.A. § 9-13-12, and the notice of levy

issued under O.C.G.A. § 48-3-9 was not a substitute for a properly-executed fieri facias, the commissioner’s subsequent tax sale of the property was invalid. *Powers v. CDSaxton Props., LLC*, 285 Ga. 303, 676 S.E.2d 186 (2009).

Summary judgment properly denied. — Special master did not err in finding that a fact question remained as to whether a proper levy of the property occurred in accordance with O.C.G.A. § 9-13-12 as deposition testimony from representatives of the sheriff’s office raised significant questions as to whether required entries of the levy, including the

necessary description of the property, were appropriately made on the writ of execution, or *fiere facias*, and in the sheriff's records; on the other hand, however, the buyer presented a tax sale deed that recited that the formalities required for a

levy had been honored, thereby providing evidence that some seizure of the property had occurred. *Davis v. Harpagon Co., LLC*, 281 Ga. 250, 637 S.E.2d 1 (2006).
Cited in *Davis v. Harpagon Co., LLC*, 283 Ga. 539, 661 S.E.2d 545 (2008).

9-13-13. Written notice of levy on land.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A *Am. Jur. Pleading and Practice Forms*, Executions, § 68.

ARTICLE 2

PARTIES IN EXECUTION

9-13-30. Execution against sureties and endorsers.

JUDICIAL DECISIONS

Tax execution sale proper. — A trial court properly granted summary judgment to the purchaser of real estate in a quiet title action that involved the taxpayer's home and the taxpayer's failure to pay the property taxes on the property as the property was properly levied upon and no question of fact remained that the sheriff officially seized the property. Further, the

affidavits of the civil process coordinator at the time of the tax sale, and the coordinator's successor, were properly admitted into evidence as such affidavits fell within the business records exception to the rule against hearsay. *Davis v. Harpagon Co., LLC*, 283 Ga. 539, 661 S.E.2d 545 (2008).

9-13-36. Transfer of execution upon payment; status of transferee; recording necessary to preserve lien; exception for tax executions.

Law reviews. — For annual survey of real property law, see 58 *Mercer L. Rev.* 367 (2006).

ARTICLE 3

PROPERTY AGAINST WHICH EXECUTION LEVIED

9-13-53. When constable may levy on land; sale by sheriff.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A *Am. Jur. Pleading and Practice Forms*, Executions, § 100.

9-13-60. Taking up of debt to give defendant legal title to property; notice of levy and sale; application of proceeds.

JUDICIAL DECISIONS

Priority is not a relevant issue in determining compliance with O.C.G.A. § 9-13-60. Harris v. Pullen (In re Pullen), 414 B.R. 871 (Bankr. N.D. Ga. 2009).

Levy made before deed of reconveyance is void.

When a judgment creditor paid off a debtors' security deed, a levy and sale of the debtor husband's one-half undivided

interest in the property was void because the property was not reconveyed to the husband since, upon paying off the first deed, the creditor did not obtain a cancellation of the deed, and did not, after obtaining the assignment from the mortgage services company, execute a quitclaim for levy and sale. Harris v. Pullen (In re Pullen), 414 B.R. 871 (Bankr. N.D. Ga. 2009).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 24A Am. Jur. Pleading and Practice Forms, Vendor and Purchaser, § 3.

ARTICLE 4

SATISFACTION OR DISCHARGE OF JUDGMENT AND EXECUTION

9-13-70. Suspension of execution for 60 days pending payment; bond.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Executions, § 170.

9-13-78. Control of execution after payment — By joint debtor.

JUDICIAL DECISIONS

Interest award reversed. — Award of interest for a client against an attorney from the date that the client satisfied an underlying judgment against the client, the client's son, and the attorney had no legal basis and was reversed; it had been established that the client, the client's son, and the attorney were joint tortfeasors and while O.C.G.A. § 10-7-51 authorized the award of interest running from the date of a co-surety's payment of a joint obligation, it applied to contribution

actions arising from joint instruments executed by the sureties, not to joint tortfeasors. The issue was not controlled by O.C.G.A. § 9-13-78 as it provided a method of enforcing contribution from a joint defendant and it did not purport to control an award of interest; O.C.G.A. § 7-4-12 provided that all money judgments bore post-judgment interest from the date of entry. Gerschick v. Pounds, 281 Ga. App. 531, 636 S.E.2d 663 (2006), cert. denied, 2007 Ga. LEXIS 95 (Ga. 2007).

ARTICLE 7

JUDICIAL SALES

Law reviews. — For article, “Buying are the Alternatives?,” see 16 (No. 4) Ga. Distressed Commercial Real Estate: What St. B.J. 18 (2010).

PART 1

ADVERTISEMENT

Law reviews. — For article, “Buying are the Alternatives?,” see 16 (No. 4) Ga. Distressed Commercial Real Estate: What St. B.J. 18 (2010).

9-13-140. How judicial sales advertised; description of property; advertisement and sale of livestock.

Law reviews. — For article, “Buying are the Alternatives?,” see 16 (No. 4) Ga. Distressed Commercial Real Estate: What St. B.J. 18 (2010).

JUDICIAL DECISIONS

Tax sale of property proper. — A trial court properly granted summary judgment to the purchaser of real estate in a quiet title action that involved the taxpayer’s home and the taxpayer’s failure to pay the property taxes on the property as the property was properly levied upon and no question of fact remained that the sheriff officially seized the property. Further, the affidavits of the civil process coordinator at the time of the tax sale, and the coordinator’s successor, were properly admitted into evidence as such affidavits fell within the business records exception to the rule against hearsay. *Davis v. Harpagon Co., LLC*, 283 Ga. 539, 661 S.E.2d 545 (2008).

Damages for wrongful foreclosure. — In a suit brought by a purchaser seeking damages for wrongful foreclosure of certain real property after two foreclosure sales, the trial court erred in granting the second foreclosing bank attorney fees under O.C.G.A. § 9-15-14, based on frivolous litigation since the second bank had knowledge of the purchaser’s acquisition of the property via the first foreclosure, therefore, the purchaser’s suit did not lack substantial justification as to the second bank and the second’s bank failure to provide proper notice of the sale to the

purchaser. *Royston v. Bank of Am., N.A.*, 290 Ga. App. 556, 660 S.E.2d 412 (2008).

Foreclosure advertisement sufficient as to real property only. — Advertisement which a bank published when the bank sold a bowling alley at a foreclosure sale, which provided a metes and bounds description of the property, was sufficient under O.C.G.A. §§ 9-13-40 and 44-14-162 to foreclose on and convey title only to the real property, and a trial was required to determine the amount of money the bank had to turn over to a Chapter 7 debtor’s bankruptcy estate under 11 U.S.C. § 542 because the bank improperly sold the debtor’s personal property. The court found that the court could not determine on summary judgment whether bowling alley lanes and pin setters the bank sold were fixtures or personal property, and the court ordered the parties to present evidence on that issue at trial. *Lubin v. Ga. Commerce Bank (In re Southern Bowling, Inc.)*, No. 09-06045, 2010 Bankr. LEXIS 4007 (Bankr. N.D. Ga. Oct. 8, 2010).

Foreclosure advertisement sufficient. — Foreclosure sale advertisement of a condominium development was sufficient although the advertisement did not note that several units in the development

had been sold prior to the foreclosure. The description of the property was correct in itself, and the excepted units were identified on the courthouse steps at the time of the sale. *Dan Woodley Cmtys., Inc. v. Suntrust Bank*, 310 Ga. App. 656, 714 S.E.2d 145 (2011).

Superior court did not err in finding that a lender's advertisement of a nonjudicial foreclosure sale properly included a description of the property in accordance with O.C.G.A. § 9-13-140(a) because the legal description in the advertisement was identical to the description in the security deed by which the lender took the lender's interest from a construction company and guarantors; thus, there was no discrepancy between the two, and the advertisement properly reflected the

interest taken under the deed and available at the foreclosure sale. *Diplomat Constr., Inc. v. State Bank of Tex.*, No. A11A1836, 2012 Ga. App. LEXIS 297 (Mar. 19, 2012).

Preservation for review. — Property owner's claim that a foreclosure advertisement did not comply with O.C.G.A. §§ 9-13-140(a) and 44-14-162 was waived on appeal due to the owner's failure to comply with Ga. Ct. App. R. 25(a)(1); the owner did not show how the enumeration of error was preserved for review, and the owner did not provide any relevant citation to the record to show that the claim of error was raised below. *White Oak Homes, Inc. v. Cmty. Bank & Trust*, No. A11A2191, 2012 Ga. App. LEXIS 221 (Mar. 1, 2012).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 15A Am. Jur. Pleading and Practice Forms, Judgments, § 521. 15A

Am. Jur. Pleading and Practice Forms, Judicial Sales, § 12.

9-13-142. Requirements for official organ of publication; designation where no journal or newspaper qualifies; how official organ changed; notice to Secretary of State.

JUDICIAL DECISIONS

Publication ordinance not a prior restraint. — Requirement that applicants had to "advertise" in the legal gazette was not a prior restraint in violation of the First Amendment; thus, city's current zoning and adult entertainment ordinance was valid as the ordinance placed no time limits on when the paper had to run the advertisements and no repercussions if the paper failed to run the adver-

tisement in a timely manner. Further, the legal organ of the county published public notices or advertisements as a matter of course and had certain restrictions placed on it pursuant to O.C.G.A. § 9-13-142. *Augusta Video, Inc. v. Augusta-Richmond County*, No. 06-16053, 2007 U.S. App. LEXIS 21638 (11th Cir. Sept. 6, 2007) (Unpublished).

9-13-143. Rates for legal advertisements.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 18B Am. Jur. Pleading and

Practice Forms, Newspapers, Periodicals, and Press Associations, § 1.

PART 2

CONDUCT AND EFFECT

9-13-161. Where and when sales under execution held; change of place of public sales by court order.

Law reviews. — For article, “Buying are the Alternatives?,” see 16 (No. 4) Ga. Distressed Commercial Real Estate: What St. B.J. 18 (2010).

9-13-163. Sale of perishable property — When and by whom ordered; where held.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 15A Am. Jur. Pleading and Practice Forms, Judicial Sales, § 1.

9-13-166. Form of tender.

JUDICIAL DECISIONS

Refusal to confirm sale was error. — Trial court’s refusal to confirm a judicial sale was reversed as a cashier’s check tendered by a buyer was the statutory and functional equivalent of a cash payment; because of the plain language and purpose of O.C.G.A. § 9-13-166, the unsuccessful bidders should not have been confused;

further, the unsuccessful bidders did not have any more cash available and could not have obtained a cashier’s check for any more than the amount they bid; any confusion as to the appropriate method of payment made no difference in the outcome. *Upchurch v. Chaney*, 280 Ga. 891, 635 S.E.2d 124 (2006).

9-13-170. Liability for purchase money; officer’s collection options.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 15A Am. Jur. Pleading and Practice Forms, Judicial Sales, § 70.

9-13-172. When execution sale set aside.

JUDICIAL DECISIONS

Defect in notice of sale not preserved for review. — As a purchaser of property at a tax sale failed to raise a claim of error in a summary judgment motion regarding an erroneously listed record owner of property in the notice of

tax sale, such claim of error was waived on appeal; further, any such defect in the notice warranted an award of damages under O.C.G.A. § 9-13-172, but did not warrant setting aside the deed, as requested by the purchaser. *Hash Props.*,

LLC v. Conway, 298 Ga. App. 241, 679 S.E.2d 799 (2009).

Second unauthorized tax sale did not affect fee simple title of buyer at first tax sale. — Although a county did not have the recognized statutory option of conducting a second tax sale in order to satisfy the remainder of the tax deficiency owed, and while the assignee who took the

property as a result of the second tax sale might be entitled to a refund of the purchase price, the special master's recommendation to issue a decree of fee simple title in the underlying property to the buyer at the first tax sale was upheld on appeal. *DRST Holdings, Ltd. v. Agio Corp.*, 282 Ga. 903, 655 S.E.2d 586 (2008).

9-13-172.1. "Eligible sale" defined; rescision of sale; damages.

JUDICIAL DECISIONS

Legislative intent. — Legislature intended with O.C.G.A. § 9-13-172.1 to create a mechanism to give homeowners every opportunity to cure a default and avoid the harmful and disturbing effects of foreclosure because there is an unquestionable impact by the statute on homeowners of property in foreclosure who, prior to sale, cure the default or enter into agreements to cure the default. *JIG Real Estate, LLC v. Countrywide Home Loans, Inc.*, 289 Ga. 488, 712 S.E.2d 820 (2011).

Statute not unconstitutionally vague. — Trial court did not err by upholding the constitutionality of O.C.G.A. § 9-13-172.1 because the purchaser completely failed to carry the purchaser's burden of showing that O.C.G.A. § 9-13-172.1 was unconstitutionally vague in any of the statute's applications; persons of common intelligence would

have no difficulty understanding that O.C.G.A. § 9-13-172.1 in and of itself authorizes rescission of an eligible sale due to the occurrence of the bankruptcy stay in O.C.G.A. § 9-13-172.1(c) or one of the three situations set forth in O.C.G.A. § 9-13-172.1(d). *JIG Real Estate, LLC v. Countrywide Home Loans, Inc.*, 289 Ga. 488, 712 S.E.2d 820 (2011).

Statute authorized rescission of eligible sale. — Trial court did not err by finding that the holder of the deed to secure debt on mortgagors' property was authorized to and properly did rescind a foreclosure sale to a purchaser because O.C.G.A. § 9-13-172.1 authorized under clearly defined circumstances the rescission of an eligible sale. *JIG Real Estate, LLC v. Countrywide Home Loans, Inc.*, 289 Ga. 488, 712 S.E.2d 820 (2011).

CHAPTER 14

HABEAS CORPUS

Article 2

Procedure for Persons under Sentence of State Court of Record

Sec.

9-14-53. Reimbursement to counties for habeas corpus costs.

Law reviews. — For article, “The Writ of Habeas Corpus in Georgia,” see 12 Ga. St. B.J. 20 (2007).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Pleading and Proving Ineffective Assistance of Counsel in a Federal Habeas Corpus Proceeding: A Primer, 88 POF3d 1.	Historical Aspects and Procedural Limitations of Habeas Corpus, 39 Am. Jur. Trials 157.
Am. Jur. Trials. — Federal Habeas Corpus Practice, 20 Am. Jur. Trials 1.	Habeas Corpus: Pretrial Rulings, 41 Am. Jur. Trials 349.

ARTICLE 1
GENERAL PROVISIONS

9-14-1. Who may seek writ.

Law reviews. — For note, “Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Cred-	ibility of Recanted Testimony,” see 46 Ga. L. Rev. 213 (2011).
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JUDICIAL DECISIONS

Cited in Powell v. Brown, 281 Ga. 609, 641 S.E.2d 519 (2007).

9-14-2. Habeas corpus on account of detention of spouse or child.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 13 Am. Jur. Pleading and Practice Forms, Habeas Corpus, § 228.

9-14-3. Petition for writ — Contents.

JUDICIAL DECISIONS

Failure to attach legal process. — It was error to dismiss a business operator’s habeas petition on the ground that the business operator had not complied with O.C.G.A. § 9-14-3 by attaching a copy of the legal process forming the pretext of the business operator’s restraint; the	court was aware of no authority holding that this was grounds for dismissal of a habeas petition for lack of jurisdiction, and pleadings in a habeas corpus action were to be treated with liberality. Nguyen v. State, 282 Ga. 483, 651 S.E.2d 681 (2007).
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RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 13 Am. Jur. Pleading and Practice Forms, Habeas Corpus, § 15.

9-14-5. When writ granted.**JUDICIAL DECISIONS****Petition should have been granted.**

Habeas court's finding that a petitioner's guilty pleas were validly entered was reversed as the waiver forms signed by the petitioner and reviewed with the petitioner by the petitioner's attorneys addressed only the right to be tried by a jury; the waiver forms did not advise the petitioner that the petitioner was waiving the petitioner's right against self-incrimination and the petitioner's confrontation right. *Beckworth v. State*, 281 Ga. 41, 635 S.E.2d 769 (2006).

Habeas corpus relief should be granted to the defendant for the following reasons: first, it was undisputed that the trial court did not fully inform the defendant of de-

fendant's Boykin rights during the plea hearing; second, there was no evidence of record that the trial court entered into any colloquy with the defendant to ensure that the defendant read and fully understood the plea agreement which the defendant signed; third, there was no evidence that the defendant's trial counsel discussed defendant's Boykin rights with the defendant or that it was counsel's standard practice to do so; and, finally, there was no evidence that trial counsel actually went over the plea agreement with the defendant or any of the information that the plea agreement contained. *State v. Hemdani*, 282 Ga. 511, 651 S.E.2d 734 (2007).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 13 Am. Jur. Pleading and Practice Forms, Habeas Corpus, § 123.

9-14-7. Return day for writ.**RESEARCH REFERENCES**

Am. Jur. Pleading and Practice Forms. — 13 Am. Jur. Pleading and Practice Forms, Habeas Corpus, § 151.

9-14-10. Respondent's return to writ — When and where made.**RESEARCH REFERENCES**

Am. Jur. Pleading and Practice Forms. — 13 Am. Jur. Pleading and Practice Forms, Habeas Corpus, § 151.

9-14-16. When person not to be discharged.**JUDICIAL DECISIONS****ANALYSIS****IN GENERAL****In General****Refusal of writ upheld.**

Dismissal of an inmate's habeas petition without a hearing was proper as the petition failed to state any viable claim for pre-conviction habeas corpus relief since: (1) the inmate was not entitled to appointed counsel in the habeas corpus proceeding; (2) the habeas court was not required to make a determination of the inmate's mental state as it was an issue to be addressed in the context of the criminal prosecution; and (3) the inmate did not seek issuance of the writ on the ground

that the inmate had tendered proper bail in connection with the inmate's then-pending prosecution on the criminal charge. *Britt v. Conway*, 281 Ga. 189, 637 S.E.2d 43 (2006).

Prisoner awaiting trial was not entitled to writ of habeas corpus under O.C.G.A. § 9-14-16 because prisoner did not seek habeas relief on the ground that the case was one in which bail was allowed and where proper bail had been tendered; thus, it was not error to dismiss the habeas application without a hearing. *Britt v. Conway*, 283 Ga. 474, 660 S.E.2d 526 (2008).

9-14-22. Appeals; speedy hearing; transmittal of remittitur.**JUDICIAL DECISIONS**

Appeal from municipal court conviction for violating ordinances. — One restrained of liberty as a result of a municipal court conviction for violation of municipal ordinances is entitled to a direct appeal from a habeas court's final order on a habeas petition because a municipal court presiding over the trial of such charges is not a state court of record;

accordingly, a business operator who had been convicted in a municipal court for violating city ordinances governing permits and hours of operation was entitled to a direct appeal from a final order on a habeas petition. *Nguyen v. State*, 282 Ga. 483, 651 S.E.2d 681 (2007).

Cited in *Gresham v. Edwards*, 281 Ga. 881, 644 S.E.2d 122 (2007).

ARTICLE 2**PROCEDURE FOR PERSONS UNDER SENTENCE OF STATE COURT OF RECORD****9-14-40. Legislative intent.**

Law reviews. — For note, "Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Cred-

ibility of Recanted Testimony," see 46 Ga. L. Rev. 213 (2011).

JUDICIAL DECISIONS

After defendant's conviction has been affirmed on appeal, habeas cor-

pus petition is one of three available remedies. — Petitioner's motion to va-

cate the conviction was not an appropriate remedy in a criminal case after petitioner's murder conviction had been affirmed on direct appeal. The court overruled Division 2 of *Chester v. State*, 284 Ga. 162 (2008), which had allowed such motions under O.C.G.A. § 17-9-4, and held that in order to challenge a conviction after it had been affirmed on direct appeal, petitioner

was required to file an extraordinary motion for new trial, O.C.G.A. § 5-5-41, a motion in arrest of judgment, O.C.G.A. § 17-9-61, or a petition for habeas corpus under O.C.G.A. § 9-14-40. *Harper v. State*, 286 Ga. 216, 686 S.E.2d 786 (2009).

Cited in *Powell v. Brown*, 281 Ga. 609, 641 S.E.2d 519 (2007).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 13 Am. Jur. Pleading and Practice Forms, Habeas Corpus, § 2.

9-14-42. Grounds for writ; waiver of objection to jury composition.

Law reviews. — For note, "Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Cred-

ibility of Recanted Testimony," see 46 Ga. L. Rev. 213 (2011).

JUDICIAL DECISIONS

ANALYSIS

IN GENERAL

COMPOSITION OF GRAND OR TRIAL JURIES

EFFECTIVE ASSISTANCE OF COUNSEL

In General

Civil renewal provisions apply in habeas corpus proceedings. — O.C.G.A. § 9-14-42(c) was not a statute of repose and not an absolute bar to the refiling of a habeas corpus petition, and therefore, was not in conflict with the provisions of O.C.G.A. §§ 9-2-60(b) and (c) and 9-11-41(e), which allowed for the renewal of civil actions after dismissal. Therefore, the habeas court's dismissal of a petition as untimely was reversed. *Phagan v. State*, 287 Ga. 856, 700 S.E.2d 589 (2010).

Time for filing. — Pro se petition for habeas corpus was untimely because the petition was received by the habeas court one day after the statutory deadline of O.C.G.A. § 9-14-42(c)(1). The habeas court erred in applying the mailbox rule, under which the filing of a pro se petitioner's notice of appeal was deemed filed when delivered to prison officials, because the mailbox rule applied only to an at-

tempted appeal of a pro se habeas petitioner operating under O.C.G.A. § 9-14-52, not to the filing of the initial petition. *Roberts v. Cooper*, 286 Ga. 657, 691 S.E.2d 875 (2010).

Conflict of interest by trial counsel.

— An inmate's claim that trial counsel had a conflict of interest was a Sixth Amendment claim and thus was cognizable on habeas corpus. *Gibson v. Head*, 282 Ga. 156, 646 S.E.2d 257 (2007).

Cited in *Taylor v. Williams*, 528 F.3d 847 (11th Cir. 2008).

Composition of Grand or Trial Juries

Retroactive application of Taylor.

— Since Ga. Code Ann. § 50-127 applied to the state inmate's 1974 trial, the state habeas court's finding that the inmate's jury composition claims were procedurally defaulted under the later enacted O.C.G.A. § 9-14-42 was not an independent and adequate state ground precluding fed-

eral relief, but since the jury was empaneled before Taylor, which held that petit juries had to be drawn from a source fairly representative of the community, Taylor did not apply retroactively because Teague barred the claim. *Prevatte v. French*, 459 F. Supp. 2d 1305 (N.D. Ga. 2006), *aff'd*, 547 F.3d 1300 (11th Cir. Ga. 2008).

Effective Assistance of Counsel

Prejudice not found as to claim that counsel failed to obtain funds for forensic experts. — Death row inmate's habeas corpus petition under O.C.G.A. § 9-14-42(a) alleging ineffective assis-

tance of counsel in failure to secure funds for forensic experts failed because his theory of how his wife and her boyfriend was admitted to be possible by the state's experts, and the real issue was one of the inmate's credibility in light of non-forensic evidence that he had raped, harassed, and threatened to kill his wife in the past; therefore, his lack of funds for forensic experts did not prejudice his defense as required by O.C.G.A. § 9-14-48(d). His claim that the state presented false testimony, however, required additional findings of fact and conclusions, necessitating remand. *McMichen v. Hall*, 684 S.E.2d 641, 2009 Ga. LEXIS 640 (2009).

9-14-43. Jurisdiction and venue.

Law reviews. — For note, "Ineffective Assistance of Counsel Blues: Navigating the Muddy Waters of Georgia Law After

2010 State Supreme Court Decisions," see 45 Ga. L. Rev. 1199 (2011).

JUDICIAL DECISIONS

Petition for habeas corpus must be filed in county of petitioner's conviction. — An order entered by a superior court in Fulton County granting a parolee's petition for writ of habeas corpus was a nullity; the parolee was "not in custody" for purposes of O.C.G.A. § 9-14-43, and therefore, only the superior court in Floyd County, the county where the parolee had been convicted, could consider the petition for writ of habeas corpus. *Nix v. Watts*, 284 Ga. 100, 664 S.E.2d 194 (2008).

Petitioner incarcerated within federal penal system.

Construing the defendant's request for an out-of-time appeal from a 1995 resentencing on various convictions as one seeking habeas corpus relief, and in light of the language in O.C.G.A. § 9-14-43, the trial court's order denying the defendant relief on jurisdictional grounds was reversed, and the matter was remanded for the trial court to consider the defendant's motion as one for a writ of habeas corpus. *Anderson v. State*, 284 Ga. App. 776, 645 S.E.2d 362 (2007).

9-14-44. Petition — Contents and verification.

JUDICIAL DECISIONS

Issue of right to counsel not raised as ground for habeas corpus relief. — While a respondent was entitled to counsel on a motion to withdraw a guilty plea to aggravated assault but proceeded pro se on an appeal of the denial of that motion, the issue of the right to counsel was never raised as a ground for habeas corpus relief as required by O.C.G.A. §§ 9-14-44 and 9-14-51, and, thus, the

respondent was improperly granted a writ of habeas corpus. *Murrell v. Young*, 285 Ga. 182, 674 S.E.2d 890 (2009).

Waiver of challenge to method of proportionality review. — A habeas corpus petitioner failed to assert in the original petition, the amended petition, or the post-hearing brief a constitutional or statutory challenge to the Supreme Court of Georgia's method of proportionality

review as provided in O.C.G.A. § 17-10-35(c); therefore, petitioner's chal-

lenge was waived. *Hall v. Lee*, 286 Ga. 79, 684 S.E.2d 868 (2009).

9-14-48. Hearing; evidence; depositions; affidavits; determination of compliance with procedural rules; disposition.

Law reviews. — For annual survey of death penalty law, see 58 *Mercer L. Rev.* 111 (2006).

JUDICIAL DECISIONS

Affidavits or depositions may be used at habeas hearing as primary evidence, etc.

When a habeas court found an inmate's claim of ineffective assistance of counsel was not procedurally barred, under O.C.G.A. § 9-14-48(d), for failing to raise it on direct appeal because the allegedly ineffective counsel could not, due to illness, attend a hearing held on remand during the inmate's direct appeal, and, thus, could not be cross-examined, this was error because, even if the claim was different enough from barred claims to fall within a defaulted-claim analysis, it overlooked the readily available legal remedy of a court order to obtain counsel's sworn testimony for use at the remand hearing, under O.C.G.A. § 24-10-130, so counsel's absence from the hearing did not establish cause for failure to raise the ineffective assistance. *Schofield v. Meders*, 280 Ga. 865, 632 S.E.2d 369 (2006), cert. denied, 127 S. Ct. 958, 2007 U.S. LEXIS 257, 166 L.Ed.2d 729 (2007).

Application of miscarriage of justice analysis limited.

Extraordinary exception to the general rule that presumptions of harm that apply on direct appeal do not apply on habeas corpus to procedurally defaulted claims, should apply only when dictated by constitutional law or when clearly necessary to avoid a miscarriage of justice under O.C.G.A. § 9-14-48(d). *Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335 (2011).

Remand for additional findings and conclusions. — An inmate's claim that the State presented false testimony required additional findings of fact and conclusions, necessitating remand. *McMichen v. Hall*, 684 S.E.2d 641, 2009 Ga. LEXIS 640 (2009).

Availability of evidence on direct appeal. — When a habeas court found an inmate's ineffective assistance claim was not procedurally barred, under O.C.G.A. § 9-14-48(d), for failing to raise it on direct appeal because "the factual or legal basis for the claim was not reasonably available to counsel," this was clearly erroneous as to testimony from a detective about other shootings on the night of the murder the inmate was convicted of and a feud allegedly motivating the shooters because the detective actually testified in a remand hearing during the direct appeal of the inmate's conviction, and a number of other witnesses were questioned about the other shooting incidents, so the testimony was not unavailable. *Schofield v. Meders*, 280 Ga. 865, 632 S.E.2d 369 (2006), cert. denied, 127 S. Ct. 958, 2007 U.S. LEXIS 257, 166 L.Ed.2d 729 (2007).

Twenty year old delay in habeas petition was time-barred. — Given defendant's 20-year delay in filing a habeas petition, which resulted in total prejudice to the government in the government's ability to respond, and defendant's failure to meet defendant's burden of proving a legally valid excuse for not filing the petition sooner, the habeas court did not abuse the court's discretion in dismissing the petition under O.C.G.A. § 9-14-48(e). *Flint v. State*, 288 Ga. 39, 701 S.E.2d 174 (2010).

Procedural default.

Petitioner's habeas petition was denied because petitioner was procedurally barred from raising the four grounds enumerated in the petition since the petitioner had raised those same four claims before the state habeas court, which found that petitioner had not raised those claims

at trial or on direct appeal as required by O.C.G.A. § 9-14-48, and petitioner failed to establish sufficient cause to excuse the procedural default. *Clark v. Williams*, No. 1:07-CV-0103-RWS, 2007 U.S. Dist. LEXIS 73096 (N.D. Ga. Sept. 28, 2007).

When a habeas court found an inmate's ineffective assistance claim was not procedurally barred, under O.C.G.A. § 9-14-48(d), for failing to raise it on direct appeal because the inmate "did not have access" to testimony from a prosecutor until the habeas hearing, this was clearly erroneous as the prosecutor was present at a remand hearing during the inmate's direct appeal and was thus available to be called as a witness within the trial court's discretion. *Schofield v. Meders*, 280 Ga. 865, 632 S.E.2d 369 (2006), cert. denied, 127 S. Ct. 958, 2007 U.S. LEXIS 257, 166 L.Ed.2d 729 (2007).

Inmate was not given leave to amend a habeas corpus petition so as to assert new claims alleging that the indictment was fatally flawed and that the verdict of conviction violated double jeopardy; even if the new claims would have been timely, the amendment would have been futile because a state habeas court denied the claims on the ground that they were procedurally defaulted under O.C.G.A. § 9-14-48(d), which constituted an independent and adequate state ground sufficient to preclude federal review. *Evans v. Thompson*, No. 1:04-CV-2866-RWS, 2006 U.S. Dist. LEXIS 12954 (N.D. Ga. Mar. 15, 2006).

Because the habeas court applied the incorrect legal standards in finding the prejudice which was necessary to excuse a procedural default, remand was ordered for that court to determine actual prejudice. *Upton v. Jones*, 280 Ga. 895, 635 S.E.2d 112 (2006).

When an inmate did not raise the issue of an undisclosed conflict of interest of trial counsel on direct appeal, there was no procedural default in a habeas proceeding; trial counsel had also served as counsel on direct appeal, and counsel were not expected to allege their own ineffectiveness on direct appeal. *Gibson v. Head*, 282 Ga. 156, 646 S.E.2d 257 (2007).

Habeas court correctly concluded that the petitioner's claim that the petitioner

was tried while incompetent was barred by procedural default under O.C.G.A. § 9-14-48(d) because the claim was not pursued to a conclusion at trial and was not raised on direct appeal; for purposes of determining whether the procedural default doctrine will apply, there is no meaningful distinction between the failure to exercise a defendant's right to have his or her competence determined in the trial court and the failure to exercise a defendant's additional right to have a competency determination evaluated on appeal, and substantive claims of incompetence to stand trial will continue to be subject to procedural default. *Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335 (2011).

Actual prejudice not shown. — Death row inmate's habeas corpus petition under O.C.G.A. § 9-14-42(a), alleging ineffective assistance of counsel in counsel's failure to secure funds for forensic experts, was unsuccessful because the real issue was one of the inmate's credibility in light of non-forensic evidence that the inmate had raped, harassed, and threatened to kill the inmate's spouse in the past; therefore, the inmate's lack of funds for forensic experts did not prejudice the defense as required by O.C.G.A. § 9-14-48(d). *McMichen v. Hall*, 684 S.E.2d 641, 2009 Ga. LEXIS 640 (2009).

Procedural bars not found.

An inmate's Brady claim within a petition for habeas corpus, based upon the state's failure to produce to the defense audiotapes containing exculpatory witness statements and the inmate's own statement to police during investigation of the crimes, was not procedurally defaulted because the inmate showed cause and prejudice to excuse the default. *Walker v. Johnson*, 282 Ga. 168, 646 S.E.2d 44 (2007).

Because an inmate showed the requisite cause and prejudice from trial counsel's failure to object to the erroneous charge or raise the issue on appeal, the inmate's habeas claim based on the erroneous charge was not procedurally barred by O.C.G.A. § 9-14-48(d). *Hall v. Wheeling*, 282 Ga. 86, 646 S.E.2d 236 (2007).

Habeas relief erroneously granted.

Because: (1) the habeas court misconstrued O.C.G.A. § 9-14-48(e); (2) a record

was not required to affirmatively show that an inmate's 1965 guilty pleas were knowingly and voluntarily entered; and (3) the state was unduly prejudiced by the 38-year delay in filing for habeas relief, the inmate's petition for a writ of habeas corpus was erroneously granted. *Wiley v. Miles*, 282 Ga. 573, 652 S.E.2d 562 (2007).

Habeas court erred by granting a defendant's petition for habeas relief with regard to defendant's convictions for malice murder and other crimes as no prejudice was shown to overcome the procedural default that existed since the defendant failed to show an alleged Brady violation involved exculpatory evidence; trial counsel's testimony clearly demonstrated that the decision not to call the defendant's alibi witnesses was a fully considered and well reasoned decision under the circumstances as concerns over the witness' credibility existed; and the habeas court's finding that the record was silent on the issue

of whether defendant knowingly and voluntarily waived the defendant's right to testify at trial was clear error since the trial transcript revealed otherwise. *Upton v. Parks*, 284 Ga. 254, 664 S.E.2d 196 (2008).

Habeas court erred by granting defendant relief and vacating the defendant's death sentence for murder as the defendant failed to show that the defense was prejudiced by trial counsel rendering insufficient evidence that the defendant was mentally ill. Further, the defendant failed to show that the defense was prejudiced by trial counsel's failure to object to alleged inappropriate comments made by the prosecutor. *Hall v. Brannan*, 284 Ga. 716, 670 S.E.2d 87 (2008).

Cited in *Ford v. Schofield*, 488 F. Supp. 2d 1258 (N.D. Ga. 2007); *Walker v. Hale*, 283 Ga. 131, 657 S.E.2d 227 (2008); *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 658 S.E.2d 603 (2008).

9-14-49. Findings of fact and conclusions of law.

JUDICIAL DECISIONS

Insufficient order denying relief. — Judgment denying an appellant's request for habeas relief was vacated and the case was remanded because the order denying relief contained no indication of the facts or law on which the trial court based the court's decision and therefore failed to

meet the requirements of O.C.G.A. § 9-14-49. *Thomas v. State*, 284 Ga. 327, 667 S.E.2d 375 (2008).

Cited in *Greer v. Thompson*, 281 Ga. 419, 637 S.E.2d 698 (2006); *In re Baucom*, 297 Ga. App. 661, 678 S.E.2d 118 (2009).

9-14-51. Effect of failure to raise grounds for relief in original or amended petition.

JUDICIAL DECISIONS

Conflict of interest of trial counsel. — On a second habeas petition where an inmate claimed that trial counsel had simultaneously served as a special assistant attorney general, it was error to assume that the inmate could have discovered the conflict before filing the inmate's first habeas petition; the inmate was entitled to presume that trial counsel did not have an undisclosed conflict of interest as trial counsel had a duty to disclose the conflict under O.C.G.A. § 45-15-30 and had a clear ethical duty to

do so. *Gibson v. Head*, 282 Ga. 156, 646 S.E.2d 257 (2007).

Claim of sequestration violation not sufficiently raised. — As to any claim by petitioner death row inmate that two witnesses violated the rule of sequestration or that the testimony of those two witnesses and a third was fabricated, those claims were procedurally barred under O.C.G.A. § 9-14-51 as the claims were not raised on direct appeal or in the petitioner's state habeas corpus petition where the inmate alleged only that the

third witness violated the rule of sequestration. *Jefferson v. Terry*, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), *aff'd* in part and *rev'd* in part, 570 F.3d 1283 (11th Cir. Ga. 2009).

Basis for procedural default of federal habeas corpus. — Death row inmate was not entitled to federal habeas relief pursuant to 28 U.S.C. § 2254 on his claims that racial animosity led trial counsel to conceal the state's offer of a life sentence, thus providing ineffective assistance under U.S. Const., amend. 6, and leading to the imposition of the death penalty in violation of U.S. Const., amend. 8; both claims were procedurally barred from federal review since the state trial court found the Sixth Amendment claim *res judicata* pursuant to O.C.G.A. § 9-14-51 and relied upon Georgia procedural rules in denying the inmate relief on the Eighth Amendment claim; in any event, neither claim had merit. *Osborne v. Terry*, 466 F.3d 1298 (11th Cir. 2006), cert. denied, 552 U.S. 841, 128 S. Ct. 84, 169 L. Ed. 2d 64 (2007).

In a federal habeas case in which an inmate exhausted seven of the eight claims of ineffective assistance of appellate counsel in a state habeas proceeding, but the inmate failed to exhaust the eighth claim, that claim was procedurally defaulted under O.C.G.A. § 9-14-51. *Ogle v. Johnson*, 488 F.3d 1364 (11th Cir. 2007).

O.C.G.A. § 9-14-51 bars adjudication of

issues that could have been raised in an original or amended habeas petition; petitioner had six months between the withdrawal of an extraordinary motion for new trial and a ruling on a third state habeas petition to assert an ineffective assistance of counsel claim but failed to do so; therefore, petitioner failed to exhaust this claim. As the claim was unexhausted, the federal habeas court had to treat the claim as procedurally defaulted. *Mize v. Hall*, 532 F.3d 1184 (11th Cir. 2008), overruled on other grounds, 285 Ga. 24, 673 S.E.2d 227 (2009).

Georgia's procedural default rule, O.C.G.A. § 9-14-51, was inadequate to bar federal review of the inmate's mental retardation claim because the statute had not been consistently and regularly followed. *Conner v. Hall*, 645 F.3d 1277 (11th Cir. 2011).

Issue of right to counsel not raised as ground for habeas corpus relief. —

While a respondent was entitled to counsel on a motion to withdraw a guilty plea to aggravated assault but proceeded *pro se* on an appeal of the denial of that motion, the issue of the right to counsel was never raised as a ground for habeas corpus relief as required by O.C.G.A. §§ 9-14-44 and 9-14-51, and, thus, the respondent was improperly granted a writ of habeas corpus. *Murrell v. Young*, 285 Ga. 182, 674 S.E.2d 890 (2009).

Cited in *Ford v. Schofield*, 488 F. Supp. 2d 1258 (N.D. Ga. 2007).

9-14-52. Appeal procedure; application to Supreme Court by petitioner for certificate of probable cause; effect of appeal by respondent.

JUDICIAL DECISIONS

Application of Ga. Unif. Super. Ct. R. 33.9. — On appeal by the state of an order granting an inmate habeas relief, said order was reversed, because that inmate acknowledged, in a plea form, that by pleading guilty, the inmate was waiving a constitutional right to a jury trial; moreover, although Ga. Unif. Super. Ct. R. 33.9 applied in a guilty plea hearing, that rule did not apply to the inmate's case because it was not of a constitutional

magnitude. *State v. Cooper*, 281 Ga. 63, 636 S.E.2d 493 (2006).

Time limits.

Because the inmate sent an application for a certificate of probable cause to the wrong court, the application arrived at the Supreme Court of Georgia after the 30-day deadline; as such, the inmate's federal habeas petition was not timely based on statutory tolling. *Spottsville v. Terry*, 476 F.3d 1241 (11th Cir. 2007).

Pro se petition for habeas corpus was untimely because the petition was received by the habeas court one day after the statutory deadline of O.C.G.A. § 9-14-42(c)(1). The habeas court erred in applying the mailbox rule, under which the filing of a pro se petitioner's notice of appeal was deemed filed when delivered to prison officials, because the mailbox rule applied only to an attempted appeal of a pro se habeas petitioner operating under O.C.G.A. § 9-14-52, not to the filing of the initial petition. *Roberts v. Cooper*, 286 Ga. 657, 691 S.E.2d 875 (2010).

Right to directly appeal denial of motion for bail. — A defendant has the right to directly appeal the denial of a motion for bail pending an appeal and, to the extent that *Bailey v. State*, 259 Ga. 340 (380 SE2d 264) (1989), is contrary, the Supreme Court of Georgia overrules that case. *Humphrey v. Wilson*, 282 Ga. 520, 652 S.E.2d 501 (2007).

Cross-appeal of claims not ruled upon. — Prisoner's ineffective-assistance-of-counsel claim under 28 U.S.C.

§ 2254 was improperly found procedurally barred because it was not firmly established under O.C.G.A. § 9-14-52 or O.C.G.A. § 5-6-38 and was not a regularly followed state practice for a prisoner to cross appeal claims upon which a state habeas court did not rule when the prisoner was successful on the prisoner's other state habeas claim. *Mancill v. Hall*, 545 F.3d 935 (11th Cir. 2008).

Failure to notify appellant of proper procedure for appeal. — Appellant's failure to timely file appellant's application for certificate of probable cause was not fatal to the appeal of the denial of the appellant's habeas petition because the trial court's order only referred the appellant to O.C.G.A. § 9-14-52, and the mere reference to the statute was an insufficient method by which to notify the appellant of the proper procedure to obtain appellate review. *Thomas v. State*, 284 Ga. 327, 667 S.E.2d 375 (2008).

Cited in *Hall v. Wheeling*, 282 Ga. 86, 646 S.E.2d 236 (2007).

9-14-53. Reimbursement to counties for habeas corpus costs.

Each county of this state shall be reimbursed from state funds for court costs both at the trial level and in any appellate court for each writ of habeas corpus sought in the superior court of the county by indigent petitioners when the granting of the writ is denied or when the court costs are cast upon the respondent, but such reimbursement shall not exceed \$10,000.00 per annum total for each county. By not later than September 1 of each calendar year, the clerk of the superior court of each county shall send a certified list to The Council of Superior Court Judges of Georgia of each writ of habeas corpus sought in the superior court of the county during the 12 month period immediately preceding July 1 of that calendar year by indigent petitioners for which the granting of the writ was denied or for which the court costs were cast upon the respondent; and such list shall include the court costs both at the trial level and in any appellate court for each such writ of habeas corpus. By not later than December 15 of each calendar year, the council shall pay to the county from funds appropriated or otherwise made available for the operation of the superior courts the reimbursement as set forth in the certified list, subject to the maximum reimbursement provided for in this Code section. The list sent to the council as provided in this Code section shall be certified as correct by the governing authority of the county and by the judge of the superior court of the county. The council is authorized to devise and make available to

the counties such forms as may be reasonably necessary to carry out this Code section and to establish such procedures as may be reasonably necessary for such purposes. This Code section shall not be construed to amend or repeal the provisions of Code Section 15-6-28 or any other provision of law for funds for any judicial circuit. (Code 1933, § 50-128, enacted by Ga. L. 1978, p. 2051, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 1993, p. 1402, § 19; Ga. L. 1994, p. 97, § 9; Ga. L. 1999, p. 660, § 1; Ga. L. 2011, p. 477, § 1/SB 193.)

The 2011 amendment, effective May 11, 2011, substituted “council” for “commissioner” throughout this Code section; substituted “The Council of Superior Court Judges of Georgia” for “the commis-

sioner of administrative services” in the second sentence; and substituted “Code section” for “paragraph” in the fourth and fifth sentences.

CHAPTER 15

COURT AND LITIGATION COSTS

9-15-1. Which party liable for costs.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 7C Am. Jur. Pleading and Practice Forms, Costs, §§ 2, 3.

9-15-2. Affidavit of indigence; effect; how contested; finality of court’s judgment; inquiry on court’s own motion; order to pay costs; effect on merits; procedure when filing party not represented by counsel.

JUDICIAL DECISIONS

Documents could not be construed as proper affidavit. — A plaintiff filing pro se had not filed anything that could be construed as an affidavit of indigency under Ga. Unif. Super. Ct. R. 36.10 and O.C.G.A. § 9-15-2; the plaintiff had provided a document entitled “motion to proceed in forma pauperis” but had not had it notarized, and a referenced “application to proceed in forma pauperis” was not included in the record. *Anderson v. Hardoman*, 286 Ga. App. 499, 649 S.E.2d 611 (2007).

Trial court’s ruling on indigency nonreviewable.

In a breach of contract suit brought by an oncologist against a corporation, the corporation’s failure to submit an opposing affidavit to the oncologist’s pauper’s affidavit did not alter the fact that the trial court’s findings regarding the oncologist’s indigency were not subject to appellate review. Under O.C.G.A. §§ 5-6-47(b) and 9-15-2(a)(2), a trial court’s ruling regarding indigency was final and not subject to appellate review; the proper forum

for determining the truth of a pauper's affidavit was in the trial court. *Mitchell v. Cancer Carepoint, Inc.*, 299 Ga. App. 881, 683 S.E.2d 923 (2009).

Refusal to file pleading absent justiciable issues.

An individual was not permitted pursuant to O.C.G.A. § 9-15-2(d) to file a pro se civil complaint related to the final disposition of a family member's remains because no applicable legal authority recognized any private right of action based on alleged violations of O.C.G.A. § 31-21-44, a criminal statute relating to the disposition of human remains. *Verdi v. Wilkinson County*, 288 Ga. App. 856, 655 S.E.2d 642 (2007), cert. denied, 2008 Ga. LEXIS 397 (Ga. 2008).

Refund of filing fee. — Trial court did not err by denying a client's motion under O.C.G.A. § 9-15-2(a)(1) for a refund of the filing fee paid in the client's initial legal malpractice action after granting the client's right to proceed in forma pauperis because the client failed to provide any authority to support the contention that a trial court was required to direct the clerk to refund a filing fee paid before the filing of a pauper's affidavit. *Quarterman v. Cullum*, 311 Ga. App. 800, 717 S.E.2d 267 (2011).

Consideration of inmate's pro se pleadings.

Trial court erred in refusing to allow a prison inmate to proceed on a state law conversion claim against the Georgia Department of Corrections under the Georgia Tort Claims Act (GTCA), O.C.G.A. § 50-21-20 et seq., because the inmate stated a claim for conversion against the Department under the GTCA; the inmate alleged that prison officials wrongfully confiscated the inmate's personal property contrary to the Department's Standard Operating Procedures. *Romano v. Ga. Dep't of Corr.*, 303 Ga. App. 347, 693 S.E.2d 521 (2010).

Trial court did not err in disallowing a prison inmate to file a conversion claim against a warden and corrections officers under the Georgia Tort Claims Act (GTCA), O.C.G.A. § 50-21-20 et seq., be-

cause their actions were clothed with official immunity under the GTCA, O.C.G.A. § 50-21-25(b), since they were acting within the scope of their official duties when they confiscated the inmate's personal property; the inmate acknowledged that the Georgia Department of Corrections had to be named as a defendant, which necessarily amounted to a concession that Department employees were not proper defendants, and their alleged tortious conduct occurred while they were acting within the scope of their official duties. *Romano v. Ga. Dep't of Corr.*, 303 Ga. App. 347, 693 S.E.2d 521 (2010).

Trial court did not err in denying a prison inmate's request to proceed in forma pauperis on a claim that the Georgia Department of Corrections, the warden of a state prison, and two corrections officers were liable under 42 U.S.C. § 1983 for the wrongful confiscation of the inmate's personal property because the inmate's attempt to state a § 1983 claim against the warden and officers in their individual capacities failed since the inmate did not adequately allege a violation of rights under the Fourteenth Amendment; neither a state agency nor state officers acting in their official capacities are "persons" susceptible to liability under § 1983. *Romano v. Ga. Dep't of Corr.*, 303 Ga. App. 347, 693 S.E.2d 521 (2010).

Error to dismiss appeal. — Trial court's dismissal of an appeal from a summary judgment dismissing a wrongful death claim brought by four children, due to the failure of two of the children to pay costs or submit affidavits of indigency, was in error as to two of the children who filed affidavits of indigency; assuming the children filed true affidavits of indigence (O.C.G.A. § 9-15-2(a)(2), (b)), the children had rights to appeal from the dismissal of the children's proportionate shares of the wrongful death case because: (1) the wrongful death claim was not jointly in all the children or in none of the children; and (2) originally, each child had a separate claim for one-fourth of the value of the decedent's life. *Mapp v. We Care Transp. Servs.*, No. A11A1986; No. A11A1987, 2012 Ga. App. LEXIS 107 (Feb. 6, 2012).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 7C Am. Jur. Pleading and Practice Forms, Costs, § 49.

9-15-4. Deposit prior to filing by clerk; exception if affidavit of indigence filed; repayment of excess; exemptions.

Law reviews. — For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

JUDICIAL DECISIONS

Cited in *Anderson v. Hardoman*, 286 Ga. App. 499, 649 S.E.2d 611 (2007).

9-15-11. Inclusion of costs in judgment; itemization and endorsement on execution.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 7C Am. Jur. Pleading and Practice Forms, Costs, § 80.

9-15-14. Litigation costs and attorney’s fees assessed for frivolous actions and defenses.

Law reviews. — For annual survey of domestic relations law, see 58 Mercer L. Rev. 133 (2006). For article, “Of Frivolous Litigation and Runaway Juries: A View from the Bench,” see 41 Ga. L. Rev. 431 (2007). For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008). For annual survey on appellate practice and procedure, see 61 Mercer L. Rev. 31 (2009). For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

JUDICIAL DECISIONS

ANALYSIS

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General Consideration

No constitutional mandate that attorney’s fees be awarded only pursuant to O.C.G.A. § 9-15-14 or O.C.G.A. § 13-6-11. — Trial court erred in finding

that the Tort Reform Act of 2005, O.C.G.A. § 9-11-68, violated Ga. Const. 1983, Art. I, Sec. I, Para. XII, since the court permitted the recovery of attorney’s fees absent the prerequisite showings of either O.C.G.A.

§ 9-15-14 or O.C.G.A. § 13-6-11, because there was no constitutional requirement that attorney's fees be awarded only pursuant to § 9-15-14 or § 13-6-11; in Georgia, attorney's fees are recoverable when authorized by some statutory provision or by contract, and § 9-11-68 is such a statutory provision authorizing the recovery of attorney's fees under specific circumstances. *Smith v. Baptiste*, 287 Ga. 23, 694 S.E.2d 83 (2010).

Awards not directly to attorney. — Any award of fees or expenses under OCGA § 9-15-14 (a) "shall be awarded to any party" and not directly to the attorney for the party. The court may, of course, specify the amounts due to each attorney or law firm, but the award itself, as specified in the statute, is for the benefit of the party litigant. *Brewer v. Paulk*, 296 Ga. App. 26, 673 S.E.2d 545 (2009).

Fees for unsuccessful claim not recoverable.

In a homeowner's breach of contract action against a builder, a trial court's refusal to award attorney's fees to the builder was upheld because the builder did not prevail on any of the builder's motions or claims. *Sierra-Corral Homes, LLC v. Pourreza*, 308 Ga. App. 543, 708 S.E.2d 17 (2011), cert. denied, No. S11C1121, 2011 Ga. LEXIS 584 (Ga. 2011).

Award of attorney's fees improper. — Attorney's fees incurred in connection with appellate proceedings are not recoverable under O.C.G.A. § 9-15-14, and thus a trial court's award of attorney's fees to a wife based, in part, on a husband's prior appeal, was improper. *McGahee v. Rogers*, 280 Ga. 750, 632 S.E.2d 657 (2006).

Because there was no evidence that a plaintiff was given an opportunity to challenge the basis on which the fees were assessed in favor of the defendant, that portion of the trial court's judgment that assessed attorney fees had to be vacated, and the matter remanded for an evidentiary hearing regarding whether the defendant was entitled to an award under O.C.G.A. § 9-15-14(b) based on the plaintiff's misconduct, and if so, the amount of the award. *Honkan v. Honkan*, 283 Ga. App. 522, 642 S.E.2d 154 (2007).

Trial court erred in awarding attorney fees and costs as a sanction against an assisted living facility patient and the patient's counsel for filing suit against the wrong entity; suit had been filed against the entity based on erroneous information received from the DHR, defense counsel failed to provide the patient's counsel with competent evidence that the facility was not the proper defendant until after suit was filed, and there was no evidence that the patient sued the entity for purposes of delay, harassment, or unnecessary expansion of litigation. *Wallace v. Noble Vill. at Buckhead Senior Hous., LLC*, 292 Ga. App. 307, 664 S.E.2d 292 (2008).

Trial court erred in awarding defendants attorney fees on grounds that a complaint was frivolous on the complaint's face, as its grant of summary judgment to the defendants on two of the five claims was reversed on appeal, and because the trial court failed to cite O.C.G.A. § 9-15-14 or make the necessary findings, including that the fees were reasonable. *Walker v. Walker*, 293 Ga. App. 872, 668 S.E.2d 330 (2008).

Record revealed facts supporting justiciable issues of law in the married couple's suit against a clergyman for, inter alia, breach of fiduciary duty/confidential relationship under O.C.G.A. § 23-2-58 and loss of consortium, thus, an award of attorney fees was reversible error and any award that may have been appropriate needed to be reconsidered remembering that the trial court must limit the fees award "to those fees incurred because of [the] sanctionable conduct" and that "lump sum" or unapportioned attorney fees awards are not permitted in Georgia. *Brewer v. Paulk*, 296 Ga. App. 26, 673 S.E.2d 545 (2009).

Attorney fees award for a father pursuant to O.C.G.A. § 9-15-14(b) was improper because the mother's action seeking a paternity finding and child support was not frivolous despite the parties' artificial insemination agreement which precluded the father's responsibility; although the trial court ruled in the father's favor on the mother's underlying claim, there was no controlling authority directly on the question of the enforceability of an artificial insemination contract at the

time the mother filed the claim, and the mother cited authority that arguably supported a different conclusion from that reached by the trial court on the public policy question, specifically Georgia authority precluding parents from waiving by agreement a child's right to support. *Brown v. Gadson*, 298 Ga. App. 660, 680 S.E.2d 682 (2009).

Trial court erred in awarding a father attorney fees because as parties opposing a claim for attorney fees, the grandparents had a basic right to confront and challenge testimony as to the value and need for legal services, and the record did not show that the grandparents were afforded such an opportunity. *Srader v. Midkiff*, 303 Ga. App. 514, 693 S.E.2d 856 (2010).

Law of the case rule applied.

As a prior action arising from a real estate contract dispute resolved the issue of attorney fees against an attorney and the attorney's clients pursuant to O.C.G.A. § 9-15-14, that became the law of the case pursuant to O.C.G.A. § 9-11-60(h), such that a second action seeking attorney fees against the attorney was precluded. *Fortson v. Hardwick*, 297 Ga. App. 603, 677 S.E.2d 784 (2009), cert. denied, No. S09C1447, 2009 Ga. LEXIS 407 (Ga. 2009).

Trial court's improper reference to pending motion required vacation. — Because the trial court erred in finding that the requirements of class certification under O.C.G.A. § 9-11-23 were moot, concluding that there was no merit to the action, the finding was reversed; further, the case was remanded based on the court's failure to satisfy the specific provisions of § 9-11-23(f)(3) and due to an improper reference to a pending motion for attorney fees under O.C.G.A. § 9-15-14 and unspecified potential conflicts of interest. *Gay v. B. H. Transfer Co.*, 287 Ga. App. 610, 652 S.E.2d 200 (2007).

Cited in *McKesson Corp. v. Green*, 286 Ga. App. 110, 648 S.E.2d 457 (2007); *Cothran v. Mehosky*, 286 Ga. App. 640, 649 S.E.2d 838 (2007); *Hendry v. Wells*, 286 Ga. App. 774, 650 S.E.2d 338 (2007); *Roofers Edge, Inc. v. Std. Bldg. Co.*, 295 Ga. App. 294, 671 S.E.2d 310 (2008); *Mongerson v. Mongerson*, 285 Ga. 554,

678 S.E.2d 891 (2009), overruled on other grounds, 288 Ga. 670, 706 S.E.2d 456 (2011); *Simmons v. Simmons*, 288 Ga. 670, 706 S.E.2d 456 (2011).

Procedure

Strict compliance required.

Because the superior court's order awarding attorney fees to a party under O.C.G.A. § 9-15-14 failed to include the necessary findings of fact to support the award, specifically identifying the conduct upon which the award was made, the award was vacated. Thus, on remand, if the court determined that fees were warranted, it should make express findings of fact and conclusions of law as to the statutory basis for the fee award. *Panhandle Fire Prot., Inc. v. Batson Cook Co.*, 288 Ga. App. 194, 653 S.E.2d 802 (2007).

The denial of a wife's alleged claim for attorney fees in a divorce action was upheld on appeal where the wife's sole request for attorney fees came within a motion for contempt the wife filed against the husband and strict compliance with O.C.G.A. § 9-15-14(e) required a claim for attorney fees to be made by motion. *Jackson v. Jackson*, 282 Ga. 459, 651 S.E.2d 92 (2007).

Timing of request for attorney fees.

As real property contestants failed to file a request for attorney fees pursuant to O.C.G.A. § 9-15-14 within 45 days following a trial court's final disposition in a real property proceeding, the trial court erred in granting the contestants' request because the court lacked jurisdiction to consider the motion; the time for filing the motion began to run when judgment was entered under O.C.G.A. § 5-6-31, and the time when a civil disposition form was filed under O.C.G.A. § 9-11-58(b) had no effect on the timing for purposes of the motion. *Horesh v. DeKinder*, 295 Ga. App. 826, 673 S.E.2d 311 (2009).

Strategic lawsuits against public participation. — There is no requirement that a party first seek to invoke O.C.G.A. § 9-15-14 or O.C.G.A. § 51-7-80 before seeking the protections of O.C.G.A. § 9-11-11.1. *Hagemann v. City of Marietta*, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

Necessary evidence demonstrating fee.

Attorney fee awarded under O.C.G.A. § 9-15-14 was vacated, and the case was remanded as the trial court was ordered to sufficiently determine whether additional facts adduced after the denial of the prevailing party's motion for summary judgment authorized the attorney's fee award. *Johnston v. Correale*, 285 Ga. App. 870, 648 S.E.2d 180 (2007).

Findings by court must support award.

Trial court erred in awarding attorney fees under O.C.G.A. § 9-15-14 without making any findings in support of the award. *Robinson v. Williams*, 280 Ga. 877, 635 S.E.2d 120 (2006).

Because the trial court failed to make findings sufficient to support an attorney's fee award under either O.C.G.A. § 19-6-2 or O.C.G.A. § 9-15-14(b), this issue had to be remanded for an explanation of the statutory basis for the award and any findings necessary to support it. *Cason v. Cason*, 281 Ga. 296, 637 S.E.2d 716 (2006).

The trial court's orders concerning an award under O.C.G.A. § 9-15-14(a) or (b) did not contain the findings necessary to support such an award; neither the original application or the trial court's orders on the subjects mentioned the statute, and the trial court concluded only that a motion was filed without justification, that a hearing confirmed its lack of merit, and that an award would fairly compensate the nonmoving party. *Interfinancial Midtown, Inc. v. Choate Constr. Co.*, 284 Ga. App. 747, 644 S.E.2d 281 (2007).

In a divorce case, an award of attorney fees to the wife had to be reversed because the trial court had not specified whether it was awarding fees under O.C.G.A. § 19-6-2 or O.C.G.A. § 9-15-14 and had not made any findings in support of its award. *Leggette v. Leggette*, 284 Ga. 432, 668 S.E.2d 251 (2008).

Trial court stated that the court was awarding attorney fees and expenses under O.C.G.A. § 9-15-14 against an intervenor in a bond validation proceeding because the intervention was brought for an improper purpose, to extort money from developers. However, the trial court failed

to make findings supporting the court's award, requiring remand. *Citizens for Ethics in Gov't, LLC v. Atlanta Dev. Auth.*, 303 Ga. App. 724, 694 S.E.2d 680 (2010), cert. denied, No. S10C1350, 2010 Ga. LEXIS 722 (Ga. 2010).

Award of attorney's fees to a party in a partition action was not authorized under O.C.G.A. § 9-15-14 because the trial court did not make any findings of conduct authorizing an award under that section as required. *O'Connor v. Bielski*, 288 Ga. 81, 701 S.E.2d 856 (2010).

Trial court erred in awarding a husband attorney fees because the court merely ordered the wife to pay attorney fees to the husband without findings of fact and without any cogent evidence of the work performed by the husband's counsel and the nature thereof. *Holloway v. Holloway*, 288 Ga. 147, 702 S.E.2d 132 (2010).

Trial court did not abuse the court's discretion by awarding attorney fees under O.C.G.A. § 9-14-15(b), but the trial court's order failed to show how the court apportioned the award to fees generated based solely on the employee's sanctionable behavior. Remand was required for fact finding on this issue. *Trotman v. Velociteach Project Mgmt., LLC*, 311 Ga. App. 208, 715 S.E.2d 449 (2011), cert. denied, 2012 Ga. LEXIS 66 (Ga. 2012).

Trial court erred in awarding the unit owners attorney fees and costs under O.C.G.A. § 9-15-14 as the trial court did not make findings of fact or findings as to conduct authorizing the award. *Dan J. Sheehan Co. v. Fairlawn on Jones Homeowners Ass'n*, 312 Ga. App. 787, 720 S.E.2d 259 (2011).

Trial court's order failed to make express findings of fact or conclusions of law as to the statutory basis for the court's award of attorney fees to the owner's counsel, and the trial court's order failed to even specify whether the attorney fees were awarded under O.C.G.A. § 9-15-14 at all, much less which subsection of the statute supports the award. As a result, the award of attorney fees was vacated, and the matter was remanded to the trial court for reconsideration of the grant of attorney fees and for the trial court to make express findings of fact and conclu-

sions of law as to the statutory basis for any such award and the conduct which authorized the award. *Woods v. Hall*, No. A11A2349, 2012 Ga. App. LEXIS 321 (Mar. 22, 2012).

Forty-five days to move for imposition of attorney's fees. — Court rejected an appellant's argument that the trial court lacked jurisdiction to render an attorney fee award after the appellant voluntarily dismissed the appellant's lawsuit. O.C.G.A. § 9-15-14(e) authorized a party to move for attorney fees up to 45 days after the final disposition of the action. *Hart v. Redmond Reg'l Med. Ctr.*, 300 Ga. App. 641, 686 S.E.2d 130 (2009).

Post-verdict oral request converted request for fees in counterclaim to motion. — In a civil suit involving the title of real property, a trial court erred by denying the prevailing parties' oral post-verdict request for an award of attorney fees under O.C.G.A. § 9-15-14(a) as such oral request converted the original request made in a counterclaim to a motion, and the opposing party had the opportunity to be heard and argue against the award. *Nesbit v. Nesbit*, 295 Ga. App. 763, 673 S.E.2d 272 (2009).

Hearing required.

Remand was required when the trial court awarded a defendant attorney fees under O.C.G.A. § 9-15-14 without a hearing. The trial court's finding that the lawsuit lacked substantial justification was insufficient to support the award; moreover, a hearing was required to enter an award of attorney fees. *Note Purchase Co. of Ga., LLC v. Brenda Lee Strickland Realty, Inc.*, 288 Ga. App. 594, 654 S.E.2d 393 (2007).

Award of attorney fees under O.C.G.A. § 9-15-14(b) was reversible error because no hearing had been held. *Slone v. Myers*, 288 Ga. App. 8, 653 S.E.2d 323 (2007), cert. denied, 129 S. Ct. 196, 172 L.Ed.2d 140 (2008).

A trial court's assessment of attorney's fees against an attorney who represented a client in an action against a magistrate judge for alleged violations of the client's civil rights was improper because the trial court failed to provide the attorney with notice that the trial court was contemplat-

ing the award of attorney fees and did not afford the attorney a hearing where the attorney could challenge the basis upon which the attorney fees were awarded. *Wall v. Thurman*, 283 Ga. 533, 661 S.E.2d 549 (2008).

Because O.C.G.A. § 9-11-68 did not apply as the statute became effective during the pendency of the litigation, because the trial court failed to include specific findings of fact to support an award of attorney's fees and costs of litigation under O.C.G.A. § 9-15-14, and because neither the first driver nor the first driver's attorney were afforded an opportunity to be heard before sanctions were imposed, the trial court erred in awarding the second driver attorney's fees and costs of litigation. *Olarsch v. Newell*, 295 Ga. App. 210, 671 S.E.2d 253 (2008).

Trial court erred in awarding a county water authority attorney fees pursuant to O.C.G.A. § 9-15-14 because the trial court failed to hold a required hearing on the motion for attorney fees, to identify the statutory basis under either § 9-15-14(a) or (b) for the award, and to include the requisite findings of conduct that authorize the award. *Meacham v. Franklin-Heard County Water Auth.*, 302 Ga. App. 69, 690 S.E.2d 186 (2009), cert. denied, No. S10C0865, 2010 Ga. LEXIS 427 (Ga. 2010).

Trial court erred in awarding a debtor attorney's fees and expenses under O.C.G.A. § 9-15-14 without holding a hearing on the debtor's motion, allowing the creditor 30 days in which to file a response as required under Ga. Unif. Super. Ct. R. 6.2, and in failing to make findings of fact or explain the statutory basis for the court's award of fees. *Unifund CCR Partners v. Mehrlander*, 309 Ga. App. 685, 710 S.E.2d 882 (2011).

Affidavits offered in support of motion. — The decision to consider a late-filed affidavit offered in support of a motion for attorney fees under O.C.G.A. § 9-15-14 lies within the sound discretion of the trial court. It does not render the motion void ab initio. *Note Purchase Co. of Ga., LLC v. Brenda Lee Strickland Realty, Inc.*, 288 Ga. App. 594, 654 S.E.2d 393 (2007).

Request for fees was to be by mo-

tion, not as a counterclaim.

A request for attorney fees set forth in a counterclaim pleading was not properly construed as an O.C.G.A. § 9-15-14 motion because a trial court could not entertain a § 9-15-14 request asserted only in the form of a counterclaim. *Hagemann v. City of Marietta*, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

Trial court's order must include findings of conduct that authorize award, etc.

Attorney fees award against purchasers under O.C.G.A. § 9-15-14 was not supported by sufficient findings in a processioning action; further, the trial court did not distinguish which part of the attorney fees were spent successfully challenging the western boundary line as set by the processioners, and a justiciable issue as to other boundaries was not completely absent. *Hall v. Christian Church of Ga., Inc.*, 280 Ga. App. 721, 634 S.E.2d 793 (2006).

In a divorce action, wherein the trial court incorporated a mediation settlement agreement entered into by the parties, the trial court erred by awarding one party attorney fees and by awarding witness fees to the mediator without explaining the statutory basis for the award and any findings necessary to support the same. *Wilson v. Wilson*, 282 Ga. 728, 653 S.E.2d 702 (2007).

State court denial of award binding on bankruptcy court. — Creditor's motion to amend its claim for sanctions against debtor under O.C.G.A. § 9-15-14 (2005) to state a claim under O.C.G.A. § 51-7-81 (2005) was denied, as the amendment was untimely and inequitable, being filed two years after debtor had been granted a discharge and the time for filing claims had long since passed. In re *Fowler*, No. 03-92256-MGD, 2006 Bankr. LEXIS 2322 (Bankr. N.D. Ga. July 10, 2006).

Application

Juvenile court had no authority to impose attorney fees. — Juvenile court properly concluded that the court had no authority to impose attorney fees under the Civil Practice Act, O.C.G.A. § 9-15-14,

because the juvenile court had not adopted O.C.G.A. § 9-15-14, and there was no implicit attorney fee award for frivolous litigation in the Juvenile Court Code, O.C.G.A. § 15-11-1 et seq.; the Act does not apply to juvenile courts. In re *T.M.M.L.*, 313 Ga. App. 638, 722 S.E.2d 386 (2012).

Attorney's fees denied.

In a negligence suit wherein a train patron was attacked and raped while exiting a train station, and the defending public transportation authority was found to have intentionally made a false response regarding the creation and maintenance of certain documents, the trial court did not abuse the court's discretion by denying the train patron's motion for attorney fees, pursuant to O.C.G.A. § 9-15-14(b), as it was entirely within the discretion of the trial court after considering all the facts and law and there was evidence that the authority's conduct did not expand the proceeding since the documents were destroyed before the discovery was propounded. *MARTA v. Doe*, 292 Ga. App. 532, 664 S.E.2d 893 (2008).

Property owners alleged a water supply company acted in bad faith, was stubbornly litigious, and caused the owners unnecessary trouble and expense. As litigation between the parties was lengthy and acrimonious; each side accused the other of numerous bad acts; and the trial court considered numerous motions and pleadings and held more than three hearings, the court did not abuse the court's discretion in failing to award fees to the owners on the owners' own motion pursuant to O.C.G.A. § 9-15-14(b). *Stewart v. Tricord, LLC*, 296 Ga. App. 834, 676 S.E.2d 229 (2009).

There was some evidence from which a jury was authorized to find wrongful eviction including a homeowner's filing of a dispossessory action against the tenant, although the jury ultimately concluded that the tenant was not a tenant but a house guest of the homeowner. Therefore, the trial court did not abuse the court's discretion in denying the defendant an award of attorney fees under O.C.G.A. § 9-15-14(b). *Rescigno v. Vesali*, 306 Ga. App. 610, 703 S.E.2d 65 (2010).

Trial court did not abuse the court's

discretion when the court declined to award the builders fees under O.C.G.A. § 9-15-14 because the trial court did not find that the property owners' allegations were without substantial justification warranting an award under § 9-15-14; in partially denying the builders' motion for summary judgment, the trial court found that there were genuine issues of fact for trial, and in the court's order denying fees, the court also stated that there were no facts revealed at trial that would have changed the court's decision on summary judgment. *O'Leary v. Whitehall Constr.*, 288 Ga. 790, 708 S.E.2d 353 (2011).

Trial court did not abuse the court's discretion in denying a motion for attorney fees filed by a homeowners' association because the proceedings were hard fought, and the feelings of the parties were intense. *Campbell v. Landings Ass'n*, 311 Ga. App. 476, 716 S.E.2d 543 (2011).

Award of fees was improper.

Award of attorney fees to the estate, if predicated on O.C.G.A. § 9-15-14(b), was erroneous, as the findings necessary to support such an award were not made; further, if attorney's fee were based on O.C.G.A. § 19-6-2, it was also erroneous, as there was no evidence of the parties' financial circumstances that authorized such an award. *Findley v. Findley*, 280 Ga. 454, 629 S.E.2d 222 (2006).

Trial court erred in awarding attorney fees to a publisher, absent a statutory basis for the award and evidence as to the reasonableness of the award; hence, the award was vacated and remand was ordered for the trial court to hold an evidentiary hearing on the amount and reasonableness of the fees. In *re* *Serpentfoot*, 285 Ga. App. 325, 646 S.E.2d 267 (2007), cert. denied, 2007 Ga. LEXIS 661 (Ga. 2007).

An award of attorney fees under O.C.G.A. § 9-15-14 had to be vacated and remanded for reconsideration when the trial court had not made findings of fact and conclusions of law supporting the award, as such findings and conclusions were mandatory and did not have to be requested under O.C.G.A. § 9-11-52(a); furthermore, the lack of findings of fact and conclusions of law in the trial court's order overcame the presumption of regu-

larity of all proceedings in a court of competent jurisdiction. *Gilchrist v. Gilchrist*, 287 Ga. App. 133, 650 S.E.2d 795 (2007).

In an election contest, the election winner was not entitled to attorney fees under O.C.G.A. § 9-15-14(a). Given the language of O.C.G.A. § 21-2-385(a) as to who could mail ballots for a voter, the complaint could not be described as lacking any justiciable issue of law or fact, and a sufficient number of ballots could have been found invalid so as to change the election result. *Kendall v. Delaney*, 283 Ga. 34, 656 S.E.2d 812 (2008).

Property owner's interpretation of O.C.G.A. § 22-1-11 was not so devoid of a justiciable issue or so lacking in substantial justification that it could not be reasonably believed that a court would accept that interpretation, such that an award of attorney fees against the owner pursuant to O.C.G.A. § 9-15-14(a) and (b) could not stand. *Fox v. City of Cumming*, 298 Ga. App. 134, 679 S.E.2d 365 (2009).

Trial court erred in holding an attorney in criminal contempt for violating an injunction and in ordering the attorney to pay a fine, costs, and attorney fees under O.C.G.A. § 9-15-14 because the attorney did not violate a receivership order; the receivership order did not apply directly to the attorney, and the attorney, personally, neither filed the notice of lien nor took action to have the lien filed, but the attorney's client filed the lien pro se on the advice of another attorney. *Cabiness v. Lambros*, 303 Ga. App. 253, 692 S.E.2d 817 (2010).

Evidence was insufficient to support the trial court's award of attorney fees pursuant to O.C.G.A. § 9-15-14(b) because the record was devoid of any evidence of the actual cost and reasonableness of a seller's attorney fees. *Murray v. DeKalb Farmers Mkt., Inc.*, 305 Ga. App. 523, 699 S.E.2d 842 (2010).

Trial court erred in awarding attorney fees to an injured employee because initially allowing a subrogation lien viability hearing only after a liability award and subsequently sanctioning the employee's employer and its workers' compensation insurer for refusing to withdraw their lien on this basis was an abuse of discretion.

Austell HealthCare, Inc. v. Scott, 308 Ga. App. 393, 707 S.E.2d 599 (2011).

Attorney fee award to sellers in a dispute between real property buyers and sellers was error under O.C.G.A. § 9-15-14 as there was evidence of mutual mistake to support the buyers' claim for contract reformation; accordingly, it was not lacking in substantial justification and a justiciable issue was presented. *Exec. Excellence, LLC v. Martin Bros. Invs., LLC*, 309 Ga. App. 279, 710 S.E.2d 169 (2011).

Trial court abused the court's discretion in awarding the insureds' attorney fees under O.C.G.A. § 9-15-14(b) because counsel for a parent and an administrator did not unnecessarily enlarge the proceedings, and the proceedings were not interposed for harassment. *Kitchens v. Ezell*, No. A11A1242, 2012 Ga. App. LEXIS 290 (Mar. 16, 2012).

No evidence supported an award of attorney fees in favor of the insureds' under O.C.G.A. § 9-15-14(a) because the position of a parent and an administrator that no settlement was reached was legally supportable; accordingly, the claims of the parent and the administrator were not so devoid of a justiciable issue that it could not be reasonably believed that a court would accept the claims, nor did their opposition to the insureds' motion to enforce settlement agreement lack substantial justification. *Kitchens v. Ezell*, No. A11A1242, 2012 Ga. App. LEXIS 290 (Mar. 16, 2012).

Trial court's order awarding attorney fees under O.C.G.A. § 9-15-14 was vacated because the order did not include the necessary findings of fact to support the award. *Hearn v. Dollar Rent a Car, Inc.*, No. A11A2355, 2012 Ga. App. LEXIS 338 (Mar. 26, 2012).

Because the trial court erred, in part, by granting summary judgment in favor of a rental company and an independent third party administrator, the trial court's attorney fees award under O.C.G.A. § 9-15-14(a) was vacated; without more specific factual findings in the trial court's order, the court of appeals could not determine what portion of the court's award related to the claims for which the court concluded genuine issues of material fact

existed. *Hearn v. Dollar Rent a Car, Inc.*, No. A11A2355, 2012 Ga. App. LEXIS 338 (Mar. 26, 2012).

Award of fees was proper. — Based on the plain and unambiguous language of O.C.G.A. § 9-15-14, no error was found in the trial court's inclusion in its award of attorney's fees to a wife, the fees she incurred for appellate proceedings that occurred during the pendency of the divorce proceedings. *Kautter v. Kautter*, 286 Ga. 16, 685 S.E.2d 266 (2009).

Trial court's award of attorney fees in favor of a seller pursuant to O.C.G.A. § 9-15-14(b) was proper because the trial court gave the buyer ample opportunity to challenge both the cost and reasonableness of the seller's attorney fees, but the buyer did not challenge either the amount or the reasonableness of such fees, and the buyer did not object to the trial court's method of determining the amount of the seller's attorney fees or otherwise request a hearing on the matter; therefore, the buyer acquiesced in the trial court's procedure and could not complain of the procedure. *Murray v. DeKalb Farmers Mkt., Inc.*, 305 Ga. App. 523, 699 S.E.2d 842 (2010).

Award of more than actual fees billed was proper. — Hindu temple's serial filing of civil complaints against individuals lawfully reporting alleged unlawful credit card fraud activity by the temple violated the anti-SLAPP statute, O.C.G.A. § 9-11-11.1, and an award of attorney's fees under O.C.G.A. § 9-15-14 for the reasonable value of the individuals' attorney's services was proper. The trial court was not limited in making the award to the amount that the attorney actually billed the clients. *Hindu Temple & Cmty. Ctr. of the High Desert, Inc. v. Raghunathan*, 311 Ga. App. 109, 714 S.E.2d 628 (2011), cert. dismissed, 2012 Ga. LEXIS 49 (Ga. 2012).

Award of hourly fees to two county salaried attorneys was proper. — In awarding attorney's fees for vexatious litigation under O.C.G.A. § 9-15-14(b), a trial court did not err in awarding \$250 per hour and \$225 per hour for two county attorneys, although the attorneys were not paid hourly but were salaried employees; there was no evidence that this was

not a reasonable fee given these attorneys' experience. *Jones v. Unified Gov't of Athens-Clarke County*, 312 Ga. App. 214, 718 S.E.2d 74 (2011), cert. denied, 2012 Ga. LEXIS 228 (Ga. 2012).

Applicability. — Because O.C.G.A. § 9-11-11.1, the anti-SLAPP statute, was not intended to immunize from the consequences of abusive litigation a party who asserted a claim with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, the statute did not apply to a county's claim for attorney's fees under O.C.G.A. § 9-15-14, after the county was granted summary judgment on a property buyer's complaint alleging that the buyer was entitled to a written verification of zoning compliance; hence, the trial court did not err in denying the county's motion to dismiss the county's request. *Earth-Resources, LLC v. Morgan County*, 281 Ga. 396, 638 S.E.2d 325 (2006).

O.C.G.A. § 9-15-14 does not authorize award to nonparties. — It was error for a trial court to award a hospital attorney fees and expenses incurred in resisting a subpoena issued in a lawsuit to which the hospital was not a party because: (1) under O.C.G.A. § 9-15-14(d), such fees and expenses awarded under O.C.G.A. § 9-15-14 could not exceed amounts reasonable and necessary to defend or assert the rights of a party, meaning a party to the litigation; and (2) the hospital was not a party to the case in which the subpoena was issued. *Reeves v. Upson Reg'l Med. Ctr.*, No. A11A2194, 2012 Ga. App. LEXIS 311 (Mar. 21, 2012).

O.C.G.A. § 9-15-14 does not authorize award to nonparties. — There is no reason to think that "party," as that term is used in O.C.G.A. § 9-15-14(d), regarding an award of attorney fees, means anything other than a named party to litigation, and attorney fees and expenses incurred by a nonparty in the defense or assertion of the nonparty's own rights were not, by definition, fees and expenses "which are reasonable and necessary for defending or asserting the rights of a party," so attorney fees and expenses under O.C.G.A. § 9-15-14(b)

generally could not be awarded to a nonparty, and, to the extent *Slone v. Myers*, 288 Ga. App. 8 (653 SE2d 323) (2007) held otherwise, it was overruled. *Reeves v. Upson Reg'l Med. Ctr.*, No. A11A2194, 2012 Ga. App. LEXIS 311 (Mar. 21, 2012).

Fees to be assessed against executor, not estate. — Since the probate court found that an executor kept an estate open without legitimate reason, disregarded court orders, breached the executor's fiduciary duty to the estate, and unnecessarily expanded the proceedings once a petition for accounting had been filed, such that an award of attorney fees to the petitioner was warranted under O.C.G.A. § 9-15-14(b), those fees had to be assessed against the executor, not the estate. *In re Estate of Holtzclaw*, 293 Ga. App. 577, 667 S.E.2d 432 (2008).

Eminent domain actions.

In a suit brought by a purchaser seeking damages for wrongful foreclosure of certain real property after two foreclosure sales, the trial court erred in granting the second foreclosing bank attorney fees under O.C.G.A. § 9-15-14 based on frivolous litigation since the second bank had knowledge of the purchaser's acquisition of the property via the first foreclosure, therefore, the purchaser's suit did not lack substantial justification as to the second bank and the second's bank failure to provide proper notice of the sale to the purchaser. *Royston v. Bank of Am., N.A.*, 290 Ga. App. 556, 660 S.E.2d 412 (2008).

Sanctions.

Because a valid general release entered into by a home buyer and home builder effectuated a binding accord and satisfaction barring any future claims between the parties, and absent evidence to void the release based on fraud, the buyer's filed claims in subsequent suit filed against the home builder were properly summarily dismissed; thus, assessment of attorney fees was not an abuse of discretion and a penalty for filing a frivolous appeal was ordered. *Pacheco v. Charles Crews Custom Homes, Inc.*, 289 Ga. App. 773, 658 S.E.2d 396 (2008).

Justification issue found.

Although most of the claims by real property sellers warranted an attorney fee award to the buyers pursuant to O.C.G.A.

§ 9-15-14, as some claims were deemed lacking in substantial justification, there was sufficient justification to support the allegations of slander of title claims based on certain statements; accordingly, a remand for determination of which portion of the fees were allocable to which claims was warranted under § 9-15-14(d). *Exec. Excellence, LLC v. Martin Bros. Invs., LLC*, 309 Ga. App. 279, 710 S.E.2d 169 (2011).

Sanction award based on attorney misconduct but dismissal unauthorized. — With regard to the landowners' declaratory judgment, mandamus, and injunctive relief suit seeking damages against a town and the town's officials alleging the unconstitutionality and invalidity of an overlay zoning district, the evidence of misconduct by the landowners' counsel in seeking an interlocutory injunction was sufficient to support the trial court's sanction award to the town and established that the trial court's award was not an abuse of discretion since the trial court's finding that the landowners' counsel knowingly and willfully presented an inaccurate and false survey in an effort to defraud the court, subvert justice, and gain an unfair advantage was a finding constituting a sufficient specification of the conduct which entitled the town to attorney's fees and costs. However, the trial court erred by dismissing the landowners' complaint based on the sanction order as dismissal of an action was not an authorized remedy under the sanction statute of O.C.G.A. § 9-15-14. *Century Ctr. at Braselton, LLC v. Town of Braselton*, 285 Ga. 380, 677 S.E.2d 106 (2009).

Award of attorney's fees for improper conduct.

Based on conduct by a husband during the litigation with the wife in a manner intended to prevent completion of the case, to harass and annoy the wife, and to cause the wife's attorney fees to increase, sufficient evidence was presented supporting an attorney fee award under O.C.G.A. § 9-15-14(b); moreover, the wife's counsel's statement as to the reasonableness of the attorney's fees was sufficient, and the husband's failure to question the wife's counsel or seek more

information waived any complaint regarding those issues. *Taylor v. Taylor*, 282 Ga. 113, 646 S.E.2d 238 (2007).

Since the evidence supported the trial court's findings that a former spouse had unreasonably extended the litigation by denying being represented by an attorney and by refusing to acknowledge the attorney's authority to enter into a settlement agreement, under O.C.G.A. § 9-15-14, the other spouse was properly awarded the attorney fees incurred in enforcing the agreement. *Ford v. Hanna*, 293 Ga. App. 863, 668 S.E.2d 271 (2008).

Fact that a personal representative prolonged administration of the estate so the personal representative could wrongfully have the estate's primary asset, a house, conveyed to the personal representative entitled the beneficiary to litigation expenses, including attorney fees, under O.C.G.A. §§ 9-15-14(b) and 13-6-11. *In re Estate of Zeigler*, 295 Ga. App. 156, 671 S.E.2d 218 (2008).

Bad faith insurance claims. — In an insured's suit asserting claims for breach of contract and bad faith breach of contract under O.C.G.A. §§ 9-2-20 and 33-4-6 in connection with an insurer's denial of the insured's claim for proceeds of a disability insurance policy, the parent corporation of the insurer, which administered the insurer's policies, was not liable upon the insured's claim for attorney fees and expenses under O.C.G.A. § 9-15-14 because even if the insured had succeeded on its underlying claims against the parent, O.C.G.A. § 33-4-6 provides the exclusive remedy for fees and costs in cases involving bad faith refusal to pay insurance proceeds. *Adams v. UNUM Life Ins. Co. of Am.*, 508 F. Supp. 2d 1302 (N.D. Ga. 2007).

Award of attorney's fees was proper where suit was not justified.

In a case in which a lessee sought attorney's fees from a lessor pursuant to O.C.G.A. §§ 9-15-14 and 13-6-11, the lessor unsuccessfully appealed the district court's award of attorney's fees. Not only had the lessee submitted evidence to support the award of attorney's fees, but the district court found that the lessor had been stubbornly litigious and had asserted baseless claims and defenses.

Cargill Ltd. v. Jennings, No. 08-14484, 2009 U.S. App. LEXIS 1090 (11th Cir. Jan. 22, 2009) (Unpublished).

Attorney's fees were properly awarded under O.C.G.A. 9-15-14(a) in an election contest because the contestor did not present any evidence showing a factual basis to cast doubt on the counting of a single vote, but instead presented web site information, which had nothing to do with any miscounting of votes or the mishandling of any absentee ballots. Davis v. Dunn, 286 Ga. 582, 690 S.E.2d 389 (2010).

Award proper under "any evidence" standard. — Award of attorney fees under O.C.G.A. § 9-15-14(a) was proper under the "any evidence" standard because there was evidence in the record supporting the trial court's findings as to the lack of predicate acts supporting racketeering claims and the lack of evidence of damages; thus, the appellate court did not need to reach the issue of whether the award was justified under § 9-15-14(b). Slone v. Myers, 288 Ga. App. 8, 653 S.E.2d 323 (2007), cert. denied, 129 S. Ct. 196, 172 L.Ed.2d 140 (2008).

Award of litigation expenses and attorney's fees justified.

County's reliance, as a defense to a developer's mandamus and inverse condemnation claim, on the memo of its expert, asserting that the developer had to comply with a list of road improvements contained in the memo, which improvements were not required by the county's ordinance, supported a trial court's award of attorney fees for the developer. Rabun County v. Mt. Creek Estates, LLC, 280 Ga. 855, 632 S.E.2d 140 (2006).

Award of fees to third party defendant. — In a suit where a mortgage company employee who was a third-party defendant was awarded attorney fees against a borrower, there was no merit to the borrower's argument that the employee should have filed a motion to sever instead of a motion to dismiss. This argument failed to take into account what actually occurred, which was that the borrower voluntarily dismissed the borrower's third-party complaint only after the employee filed a motion to dismiss, thereby retaining the option of refiling the complaint against the employee in a sep-

arate action and subjecting the employee to defending the same allegations twice. However, an evidentiary hearing on the award was required. McCray v. Fannie Mae, 292 Ga. App. 156, 663 S.E.2d 736 (2008).

Pro se parent seeking visitation modification not responsible for fees.

— Although a parent, who was acting pro se in prosecuting a petition to modify visitation, may have been slower than an attorney, this was not a finding which showed that the parent "unnecessarily expanded the proceeding by other improper conduct" as contemplated by O.C.G.A. § 9-15-14(b). Moore v. Moore-McKinney, 297 Ga. App. 703, 678 S.E.2d 152 (2009).

Award proper in divorce action. —

Trial court's award of \$60,000 attorney's fees to a wife under O.C.G.A. § 9-15-14 was upheld based on the trial court's order, which recounted several instances of the husband's misconduct during the litigation and found that they caused numerous delays, extra motions, and extra conversations, and forced the wife's counsel to make multiple requests for documents and answers and to go to otherwise unnecessary efforts to obtain needed documents. The award was also proper under O.C.G.A. § 19-6-2(a)(1) to ensure effective representation of both spouses. Miller v. Miller, 288 Ga. 274, 705 S.E.2d 839 (2010).

Award unauthorized in lieu of inadequate proof of reasonableness of attorney's bill. —

In a couple's suit for the negligent construction of a swimming pool, the trial court abused the court's discretion by awarding the couple attorney fees, pursuant to O.C.G.A. § 9-15-14(b), against the contractor as the couple's counsel presented an inadequate time sheet that was merely a half-page summary of 49 hours spent by the attorney in various activities that were not detailed. The summary did not offer any further break down of the time expended by the attorney and the time sheet attached to the affidavit did not break down the time by hours expended nor provided any detailing regarding the activities conducted by the attorney. Dave Lucas Co. v. Lewis, 293 Ga. App. 288, 666 S.E.2d 576 (2008).

Clerk of court liable for attorney's fees to litigant for failure to prepare and transmit record.

— Clerk of court was liable to a litigant for attorney's fees under O.C.G.A. § 9-15-14 based on the clerk's failure to prepare and transmit the record in the litigant's case to the appellate court as required by O.C.G.A. § 5-6-43 until six months after the record should have been prepared, and then only when the litigant filed a petition for mandamus, to which the clerk interposed meritless defenses. *Robinson v. Glass*, 302 Ga. App. 742, 691 S.E.2d 620 (2010).

Award against county in employment case proper. — Employee, a fire chief whose termination was reversed by a hearing officer, was entitled to a writ of mandamus reinstating the employee to the employee's former position after the county refused to abide by the hearing officer's decision. The employee was also entitled to reasonable attorney fees and expenses of litigation under O.C.G.A. § 9-15-14(b). *Ellis v. Caldwell*, 290 Ga. 336, 720 S.E.2d 628 (2012).

Appeals

Appellate review of awards.

Because a grandparent was not aggrieved by an attorney-fee award entered pursuant to O.C.G.A. § 9-15-14(b), that grandparent lacked standing to appeal the award and the appeals court lacked jurisdiction to address it. In the Interest of *J.R.P.*, 287 Ga. App. 621, 652 S.E.2d 206 (2007), cert. denied, 2008 Ga. LEXIS 207 (Ga. 2008).

When a developer argued that the trial court improperly awarded attorney fees under O.C.G.A. § 9-15-14(a), but the award was also made under § 9-15-14(b), and the developer did not contest the latter award specifically, the award could be sustained on independent grounds, and addressing the error raised would be purely advisory. *Prime Home Props., LLC v. Rockdale County Bd. of Health*, 290 Ga. App. 698, 660 S.E.2d 44 (2008), cert. denied, 2008 Ga. LEXIS 685 (Ga. 2008).

When application for appeal not required.

Award of attorney fees or expenses of litigation made pursuant to O.C.G.A. § 9-15-14 could be appealed without filing the application for discretionary review required by O.C.G.A. § 5-6-35(a)(10) when the underlying judgment in the case is pending. *Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011).

An appeal from an award of expenses of litigation, etc.

Trial court erred in a breach of contract case by failing to set forth any findings of fact, conclusions of law, or the statutory subsection to support an award of attorneys fees and costs granted to an asphalt company in the amount of \$600,000 as a result of the company successfully moving to exclude evidence under O.C.G.A. § 24-9-67.1. The trial court's two page order merely reciting the company's successful motion was too vague and conclusory to permit any meaningful appellate review of the award of attorney fees and expenses of litigation under O.C.G.A. § 9-15-14. *Ga. Dep't of Transp. v. Douglas Asphalt Co.*, 295 Ga. App. 421, 671 S.E.2d 899 (2009).

Post-judgment motions for fees does not toll time to appeal from final judgment.

— Supreme court was without jurisdiction to review the propriety or substance of the trial court's order denying the property owners' motion for new trial because the owners failed to timely file a notice of appeal in regard to that order, and the builders' post-judgment motions for fees under O.C.G.A. §§ 9-11-68 and 9-15-14 did not toll the time for the owners' to appeal from the order denying the owners' motion for new trial; the trial court entered a final judgment on October 4, 2007, and the owners' filing of a motion for new trial tolled the time for appeal under O.C.G.A. § 5-6-38(a), but as soon as the trial court issued the court's order disposing of the motion for new trial, the thirty-day time period to file a notice of appeal began to run, and the owners' filed the motion for new trial on March 9, 2009. *O'Leary v. Whitehall Constr.*, 288 Ga. 790, 708 S.E.2d 353 (2011).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state vexatious litigant statutes, 45 ALR6th 493.

